98-2595

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 98-2595-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

RAYSHUN D. EASON,

Defendant-Respondent.

REVIEW OF DECISION OF DISTRICT IV OF COURT OF APPEALS THAT AFFIRMED THE TRIAL COURT'S ORDER SUPPRESSING EVIDENCE THAT WAS ENTERED IN THE CIRCUIT COURT FOR ROCK COUNTY, THE HONORABLE EDWIN C. DAHLBERG, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT-PETITIONER

JAMES E. DOYLE
Attorney General

STEPHEN W. KLEINMAIER
Assistant Attorney General
State Bar No. 1014422

Attorneys for Plaintiff-Appellant-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8908

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ISSUES PRESENTED FOR REVIEW

1. Was the no-knock search warrant supported by allegations in the affidavit sufficient to show reasonable suspicion that knocking and announcing the police presence prior to entry would be dangerous?

Trial court answered: No.

Court of appeals answered: No.

2. If law enforcement officers violate the Fourth Amendment or the Wisconsin Constitution by failing to comply with the rule of announcement, may the trial court suppress the evidence in the absence of a sufficient causal relationship between the conduct constituting the constitutional violation and the discovery of the evidence to warrant suppression?

Trial court answered: Trial court did not address this issue.

Court of appeals answered: Yes.

3. When the search warrant authorizes the no-knock entry to execute the search warrant, does the good faith exception to the exclusionary rule apply to allow the admission of the evidence seized in the execution of the warrant even if the failure to comply with the rule of announcement before entry is found to be unreasonable under the Fourth Amendment to the United States Constitution and art. I, § 11 of the Wisconsin Constitution?

Trial court answered: No.

Court of appeals answered: No, because it does not have the authority to adopt the good faith exception to the exclusionary rule.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The fact that this court granted the petition for review shows that the case merits oral argument and publication of the opinion.

STATEMENT OF THE CASE

On May 1, 1998, City of Beloit police officers found cocaine while executing a search warrant at 802 Bluff Street, Apartment 2, in the City of Beloit (20:4-5, 7, 22, 24, 34-36). Present at the apartment when the police arrived were the occupants, Clinton Bentley and Shannon Eason, as well as Rayshun Eason (the defendant), a couple of small children, a gentleman from Rockford and two other females (20:5, 14).

Based on evidence seized in the execution of the warrant, the defendant on May 4, 1998, was charged with one count of possessing cocaine, within 1000 feet of a school or park, with intent to deliver in violation of Wis. Stat. §§ 961.14(7)(a), 961.41(1m)(cm)1. and 961.49 (1:1-3; Pet-Ap.:130-32).

On May 20, 1998, a joint preliminary hearing was held for the defendant, Bentley, and Shannon Eason; and the court bound over all three after finding probable cause (20:1, 49-50, 53).

An information charging the defendant with the same offense as that charged in the complaint was filed on June 16, 1998 (7:1; Pet-Ap.:133). At the arraignment on that date, the defendant stood mute while the court entered a plea of not guilty on his behalf (21:2).

On June 17, 1998, the defendant filed a motion to suppress evidence seized in the execution of the search warrant on the ground that it was seized in violation of his rights under the United States and Wisconsin Constitutions (8:1). In the affidavit attached to the motion, the defendant's attorney alleged that the police made an unjustified no-knock entry to execute the warrant (8:3).

The search warrant had authorized the police to make a no-knock entry (15:2; Pet-Ap.:124). At the July 17, 1998, hearing on the suppression motion, the defendant's

attorney agreed the only issue was whether the search warrant affidavit provided sufficient information to justify the issuance of the no-knock warrant (24:3; Pet-Ap.:112). The prosecutor argued that the affidavit provided sufficient information to justify the no-knock warrant; and, in the alternative, he argued that, if the affidavit was insufficient, the evidence should still be admissible under the good faith exception to the exclusionary rule (24:5-7; Pet-Ap.:114-16).

The trial court decided that the search warrant affidavit failed to show reasonable suspicion to justify the no-knock authorization (24:9-10; Pet-Ap.:118-19). The trial court refused to apply the good faith exception to the exclusionary rule since this court had not yet approved the exception (24:10; Pet-Ap.:119). The trial court granted the motion and ordered the suppression of the substances seized in the execution of the no-knock warrant (24:10; Pet-Ap.:119).

On September 4, 1998, the court entered its findings and order consistent with its conclusions at the hearing (18:1; Pet-Ap.:109).

The State of Wisconsin appealed from the trial court order suppressing the evidence (19:1).

The Wisconsin Court of Appeals affirmed the trial court's suppression order. *State v. Eason*, 2000 WI App 73, 234 Wis. 2d 396, 610 N.W.2d 208; Pet-Ap.:101-08. The court of appeals agreed with the trial court that the search warrant affidavit had failed to provide reasonable suspicion that knocking and announcing the police presence before entry would be dangerous. *See Eason*, 234 Wis. 2d 396, ¶8; Pet-Ap:104. The court of appeals rejected the state's argument that evidence should not be suppressed without the trial court first determining that there was a causal relationship between the failure to knock and the discovery of the evidence. *See id.*, ¶9-10; Pet-Ap.:105-06. Finally, the court of appeals said that it did not have the authority to adopt a good faith exception

to the exclusionary rule and that it could not apply such a rule until it had been approved by the Wisconsin Supreme Court. *See id,* ¶11-13; Pet-Ap.:106-07.

STATEMENT OF FACTS

On May 1, 1998, shortly after noon, City of Beloit police officers executed a search warrant at 802 Bluff Street, Apartment 2, in the City of Beloit (20:4-5, 22, 34). The police broke a door in to gain entry to the apartment (20:12-13). Although the record contains no details concerning the method of entry, the prosecutor did not contest the defense claim that the police made a no-knock entry to execute the warrant (12:1; 24:2-13; Pet-Ap.:111-22).

The warrant authorized the police to make a no-knock entry to search the apartment for cocaine, other controlled substances, paraphernalia and other evidence of possession of controlled substances with intent to deliver (15:1-2; Pet-Ap.:123-24).

The affidavit provided information showing that Clinton Bentley and Shannon Eason resided at the apartment (15:4-5; Pet-Ap.:126-27). Describing the criminal histories of Bentley and Shannon Eason, Officer John Fahrney said:

> Your affiant has checked the criminal histories of both Clinton Bentley and Shannon Eason and in doing so has learned that BENTLEY was arrested by the Belviere Illinois Police Department in 1989 for AGGRAVATED ASSAULT. Your affiant also learned that EASON has been arrested for such things as larceny (nine times), Obstructing (three times), and ASSAULT (twice).

(15:5; Pet-Ap:127.)

Fahrney said that he had participated in approximately seventy drug raids and that "[b]ased on affiant's training, experience and association with others in

those fields, he is aware that persons involved in many illegal activities, including drug related crimes often arm themselves with weapons, including firearms and sometimes use those weapons against the police and others" (15:5, 6; Pet-Ap.:127, 128). Fahrney requested the no-knock warrant so the police could gain control of the persons in the apartment to reduce the likelihood of injury to all involved (15:6-7; Pet-Ap.:128-29).

When they entered the apartment, the police found Bentley, Shannon Eason, the defendant, a couple of small children, a gentleman from Rockford and two other females (20:5, 14). Fahrney saw Bentley throw a baggie containing pieces of crack cocaine behind a bookcase (20:6-7, 35-36). Officer James Kumlien saw the defendant and Shannon Eason running to the back of the apartment and he found rocks of cocaine in the pathway where they had run (20:22-24, 35-36).

ARGUMENT

I. THE INFORMATION IN THE SEARCH WARRANT AFFIDAVIT PROVIDED A REASONABLE SUSPICION THAT KNOCKING AND ANNOUNCING BEFORE ENTERING TO EXECUTE THE WARRANT WOULD BE DANGEROUS.

The court of appeals affirmed the trial court's order suppressing the evidence seized in the execution of the search warrant because the search warrant affidavit was not sufficient to show reasonable suspicion that knocking and announcing before entering to execute the search warrant would be dangerous to the officers. *See Eason*, 234 Wis. 2d 396, ¶8; Pet-Ap.:104.

At the suppression motion hearing, the defendant's attorney argued that the affidavit failed to provide a reasonable suspicion of danger because there was no

indication that either Bentley or Shannon Eason had been arrested for a weapons charge or that guns or weapons might be involved at the apartment (24:4-5; Pet-Ap.:113-14).

The trial court concluded that the affidavit failed to satisfy the reasonable suspicion standard to justify the commissioner's approval of a no-knock entry in the search warrant (24:9-10; Pet-Ap.:118-19).

The state contends that the information in the search warrant affidavit was sufficient to permit the warrant-issuing magistrate to authorize a no-knock entry to execute the search warrant because the information provided a reasonable suspicion that knocking and announcing before entering to execute the warrant would be dangerous to the officers.

Two sets of standards should be applied by this court in reviewing the trial court's decision that the search warrant affidavit failed to show a reasonable suspicion: the standards applicable to reviews of magistrates' decisions to issue warrants, which are recited in *State v. Kerr*, 181 Wis. 2d 372, 378-81, 511 N.W.2d 586 (1994); and the standards for determining whether a no-knock entry was justified, which are stated in *Richards v. Wisconsin*, 520 U.S. 385, 394-95 (1997), and *State v. Meyer*, 216 Wis. 2d 729, 734-35, 755, 576 N.W.2d 260 (1998).

In *Richards*, 520 U.S. at 394-95, the Court described the circumstances under which the police would be justified in making a no-knock entry to execute a warrant:

> In order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. This standard--as opposed to a probable cause requirement--strikes the appropriate balance between the legitimate

> law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries. This showing is not high, but the police should be required to make it whenever the reasonableness of a no-knock entry is challenged.

(Citations omitted.)

In *Meyer*, 216 Wis. 2d at 755, the Wisconsin Supreme Court explained how it applies the *Richards* test:

> Finally we conclude that, consistent with the requirements set forth by the United States Supreme Court in *Richards II*, an officer may dispense with the rule of announcement when executing a search warrant if the officer has a reasonable suspicion, based upon the particular facts in a given case and the reasonable inferences drawn therefrom, that knocking and announcing the officer's presence would be dangerous or futile or inhibit the effective investigation of the crime. Furthermore, in determining whether reasonable suspicion exists, an officer's training and prior experience in similar situations may be considered in combination with the particular facts.

In *Kerr*, the court recited the standards used for reviewing the magistrate's issuance of a warrant. The standards in *Kerr* must be modified in one regard when applied to this case, however, because the test for approving a no-knock entry is "reasonable suspicion" rather than "probable cause."

The duty of the appellate court "is to ensure that the warrant-issuing commissioner had a substantial basis for concluding that" reasonable suspicion existed. *Kerr*, 181 Wis. 2d at 378. "The task of the warrant-issuing commissioner 'is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . ., including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a'" reasonable suspicion that knocking and announcing prior to entry would be dangerous. *Kerr*, 181 Wis. 2d at 379.

"Great deference should be given to the warrant-issuing commissioner's determination of" reasonable suspicion. *Kerr*, 181 Wis. 2d at 379; and *State v. Kerr*, 174 Wis. 2d 55, 63 n.4, 496 N.W.2d 742 (Ct. App. 1993). "The deferential standard of review is '"appropriate to further the Fourth Amendment's strong preference for searches conducted pursuant to a warrant."' *State v. DeSmidt*, 155 Wis. 2d 119, 133, 454 N.W.2d 780 (1990), (quoting *Massachusetts v. Upton*, 466 U.S. 727, 733 (1983))." *Kerr*, 181 Wis. 2d at 379.

The reviewing court accords great deference to the warrant-issuing judge's determination of reasonable suspicion and that determination will stand unless the defendant establishes that the facts are clearly insufficient to support a finding of reasonable suspicion. *See Kerr*, 181 Wis. 2d at 380.

Before reviewing the warrant affidavit under the above standards, it is necessary to consider, first, the degree of danger that must be suspected to justify the no-knock entry and, second, whether a suspect's arrest record can supply the information to satisfy the reasonable suspicion standard.

In concluding that the affidavit failed to show reasonable suspicion of danger, the court of appeals said that the affidavit had failed to show that Bentley's or Shannon Eason's arrests had involved violent conduct or weapons. *See Eason*, 234 Wis. 2d 396, ¶8; Pet-Ap.:104.

Contrary to the court of appeals' opinion, the affidavit provided reasonable suspicion that knocking and announcing would be dangerous even though it did not indicate that weapons would be in the home. Reasonable suspicion of danger is established when there is a reasonable suspicion that knocking and announcing will result in bodily harm to the officers.

Richards simply requires that the police have reasonable suspicion that knocking and announcing their

presence would be dangerous. *Richards*, 520 U.S. at 394. *Richards* does not require that the danger be deadly. Dangerous is defined as "able or likely to inflict injury : causing or threatening harm." *Webster's Third New International Dictionary* 573 (unabridged 1986). Danger is defined as "the state of being exposed to harm : liability to injury, pain, or loss : PERIL, RISK." *Id.* at 573. Therefore, circumstances are dangerous if they expose persons to harm, injury, pain or loss. Because circumstances can be dangerous without being deadly, a no-knock entry is justified if the police have reasonable suspicion that knocking and announcing their presence would expose them to a likelihood of being injured or suffering pain.

This definition of danger is supported by several cases that specify that officers may make an unannounced entry if announcement would put them in peril of bodily harm. *See Miller v. United States*, 357 U.S. 301, 309 (1958) (pointing out that some state decisions permit noncompliance with the rule of announcement when the officers believe they or someone within are in peril of bodily harm); *United States v. Singer*, 727 F. Supp. 1281, 1283 (E.D. Wis. 1990), *rev'd on other grounds*, 943 F.2d 758 (7th Cir. 1991) (permitting unannounced entry where the officers or persons within are in imminent peril of bodily harm); *Moore v. State*, 650 So. 2d 958 (Ala. Crim. App. 1994) (unannounced entry permitted when officers in good faith believe they or someone within are in peril of bodily harm); *Gaston v. Toledo*, 665 N.E.2d 264, 270 (Ohio Ct. App. 1995) (unannounced entry permitted when officers hold a reasonable belief that they are in danger of bodily harm); and *State v. Baca*, 528 P.2d 656, 657-58 (N.M. Ct. App. 1974) (unannounced entry permitted when officers in good faith believe they or someone within are in peril of bodily harm).

A generally accepted definition of bodily harm is found in *Restatement of Torts* § 15, at 33 (1934): "Bodily harm is any impairment of the physical condition of another's body or physical pain or illness." The definition

remained essentially the same but was changed somewhat in *Restatement (2d) of Torts* §15, at 27 (1965): "Bodily harm is any physical impairment of the condition of another's body, or physical pain or illness."

It is appropriate to look to the definition of bodily harm in the Restatement of Torts because the Restatement is the source of the definition of bodily harm in Wis. Stat. § 939.22(4) in the Wisconsin Criminal code. *See* V Wisconsin Legislative Council, *Judiciary Committee Report on the Criminal Code*, at 13 (1953), noting that the definition of bodily harm is based on § 15 of the Restatement of Torts.

Because officers may make an unannounced entry when knocking and announcing would place them in peril of bodily harm, they can make the no-knock entry when they have reasonable suspicion that knocking and announcing would place them in danger of physical pain or physical impairment of their bodies.

The next question is what sources of information can provide the officers and the warrant-issuing magistrate with the reasonable suspicion. In this case, the search warrant affidavit cited Bentley's and Shannon Eason's arrest records to provide the reasonable suspicion that announcement prior to entry would be dangerous (15:5; Pet-Ap.:127).

In finding that Bentley's and Shannon Eason's arrests did not provide reasonable suspicion, the court of appeals said that the affidavit failed to report whether convictions followed the arrests and that it was equally reasonable to assume that the reason no conviction was uncovered by the officer drafting the complaint was that Bentley and Eason may have been the wrong suspects. *See Eason*, 234 Wis. 2d 396, ¶8; Pet-Ap.:104. The court of appeals' comments indicate that the court believes arrest records could never provide reasonable suspicion that announcing would be dangerous.

Contrary to the court of appeals' decision, this court should hold that arrest records can be sufficient to show reasonable suspicion to justify a no-knock entry. Other courts have relied upon arrest records to show even probable cause; and the use of arrest records to show reasonable suspicion is consistent with Wisconsin law that permits courts to use unproven and uncharged offenses to sentence defendants.

In *People v. Henderson*, 58 Cal. App. 3d 349, 129 Cal. Rptr. 844, 848 (1976), the court held that the police were justified in making an unannounced entry based on information obtained from arrest reports that did not reveal the disposition of each case. In *Thompson v. Mahre*, 110 F.3d 716, 718, 722 (9th Cir. 1997), the court concluded that the unannounced entry was permitted because police had reason to believe that Joseph Deshetres was a career criminal; and the information in the affidavit supporting the court's conclusion was the record of Deshetres' numerous arrests. In *State v. Jones*, 274 N.W.2d 273, 276 (Iowa 1979), the court found that the police were justified in making the warrantless entry into the apartment because there were exigent circumstances based on the officers' reasonable belief that the defendant was armed based on his prior arrest file and the fact he was suspected of commission of a felony involving use of force. Finally, in *United States v. Reilly*, 2000 WL 1277216 (9th Cir. 2000), in finding that there were exigent circumstances to justify the no-knock entry, the court relied in part on the report to the FBI agent in Arizona from the agents in Pittsburgh that Reilly was wanted for numerous violent offenses. Therefore, just as the police could rely on arrest records in *Henderson*, *Thompson* and *Jones* and on the "wanted" report in *Reilly*, the police and the court commissioner in this case could rely on the arrest reports for Bentley and Shannon Eason to establish the reasonable suspicion that knocking and announcing would be dangerous to the police.

The state's research did not find any Wisconsin cases using arrests to establish reasonable suspicion to justify a

no-knock entry. However, arrests and similar circumstances can be used by a court at sentencing. Explaining the purpose of gathering information at sentencing, the court said in *State v. Fisher*, 211 Wis. 2d 665, 678, 565 N.W.2d 565 (Ct. App. 1997):

> The court has the responsibility to acquire the full knowledge of the character and behavior of the defendant before imposing sentencing. "In determining the character of the defendant and the need for his incarceration and rehabilitation, the court must consider whether the crime is an isolated act or a pattern of conduct."

(Citation omitted.)

To acquire the full knowledge and character of the defendant before imposing sentence, the court can consider dismissed offenses, *State v. Lechner*, 217 Wis. 2d 392, 422-23, 576 N.W.2d 912 (1998), and *Elias v. State*, 93 Wis. 2d 278, 285, 286 N.W.2d 559 (1980), as well as uncharged and unproven offenses, *Elias*, 93 Wis. 2d at 284, *State v. Damaske*, 212 Wis. 2d 169, 195-96, 567 N.W.2d 905 (Ct. App. 1997), *Fisher*, 211 Wis. 2d at 678, *State v. Mosley*, 201 Wis. 2d 36, 45, 547 N.W.2d 806 (Ct. App. 1996). In addition, for sentencing purposes, the court may also consider offenses for which the defendant has been acquitted. *See United States v. Watts*, 519 U.S. 148 (1997) (in holding that sentencing legislation permitted the courts to consider acquitted offenses, the Court also indicated that there were no constitutional restrictions on the use of the information); and *Lechner*, 217 Wis. 2d at 422-23 (sentencing court could consider defendant's criminal offenses regardless of whether the offenses resulted in "dismissal, acquittal, or conviction").

Because a court may consider uncharged, unproven and dismissed offenses as well as offenses for which the defendant has been acquitted in determining the length of time to deprive a defendant of liberty by confining him in prison, the police and the courts should be able to use a suspect's arrest record to show the suspect's character and

behavior to establish the low level of reasonable suspicion that knocking and announcing before entry would be dangerous to the police.

The court of appeals found the arrest records insufficient in part because it was reasonable to assume that no convictions were reported because it was found that Bentley and Shannon Eason were the wrong persons. *See Eason*, 234 Wis. 2d 396, ¶8; Pet-Ap.:104.

This court should reject the court of appeals' criticism of the arrest records because the criticism is inconsistent with the law that "conduct which has innocent explanations may also give rise to a reasonable suspicion of criminal activity." *State v. Young*, 212 Wis. 2d 417, 430, 569 N.W.2d 84 (Ct. App. 1997). Conduct supports a finding of reasonable suspicion as long as a reasonable inference of unlawful activity can be objectively discerned from it; and it is not necessary to rule out the possibility of innocent behavior in order to find reasonable suspicion. *See State v. Waldner*, 206 Wis. 2d 51, 60, 556 N.W.2d 681 (1996); *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990); *State v. Jackson*, 147 Wis. 2d 824, 835, 434 N.W.2d 386 (1889); and *Young*, 212 Wis. 2d at 430. Therefore, when a person's arrest records support a reasonable inference that announcing before entry will be dangerous to the police, the reasonable suspicion standard is satisfied to justify the no-knock entry. The affidavit does not have to rule out the possible innocent explanation of a mistaken arrest in order for the arrest records to provide reasonable suspicion.

In this case, the arrest records of Bentley and Shannon Eason provided particular facts to show reasonable suspicion that knocking and announcing before entry would result in bodily harm to the officers.

The affidavit reported that Bentley had been arrested for aggravated assault and Shannon Eason had been arrested twice for assault and three times for obstructing (15:5; Pet-Ap.:127). According to current Illinois statutes,

aggravated assault is committed when a person commits an assault in specified circumstances. *See* 720 ILCS 5/12-2. A person commits an assault when he engages in conduct that places another in reasonable apprehension of receiving a battery. *See* 720 ILCS 5/12-1. A person commits a battery when he intentionally or knowingly without legal justification causes bodily harm to an individual. *See* 720 ILCS 5/12-3. In the battery statute, bodily harm means "some sort of physical pain or damage to the body, like lacerations, bruises or abrasions, whether temporary or permanent." *People v. Mays*, 437 N.E.2d 633, 635-36 (Ill. 1982).

Therefore, when Bentley and Eason were arrested for aggravated assault and assault, they were arrested for crimes that indicated they had engaged in conduct that placed others in reasonable apprehension of receiving bodily harm. Because Bentley and Eason had engaged in such conduct, the arrest records provided reasonable suspicion that knocking and announcing before entering would put the officers in peril of receiving bodily harm; that is, reasonable suspicion that knocking and announcing would be dangerous to the officers.

The finding of reasonable suspicion is fortified by Eason's arrests for obstructing, which indicated that she was a person who engaged in conduct placing another in reasonable apprehension of receiving bodily harm and she was willing to resist or obstruct the performance of a peace officer. *See* 720 ILCS 5/31-1(a) (resisting or obstructing a peace officer). Eason's arrest record provided reasonable suspicion that she would resist the execution of the search warrant by causing bodily harm.

In addition to the particular facts concerning Bentley and Eason that were reported in the affidavit, Officer Fahrney cited his experience that persons involved in drug-related crimes arms themselves with weapons, including firearms, and they sometimes use the firearms against the police (15:6; Pet-Ap.:128). Under *Meyer*, 216 Wis. 2d at 755, the warrant-issuing magistrate could

consider Officer Fahrney's experience in combination with the particular facts in determining whether reasonable suspicion existed. Fahrney's experience that persons involved in drug-related crimes are often armed, considered in combination with Bentley's and Eason's arrests for crimes indicating they engaged in conduct demonstrating a willingness to cause bodily harm and Eason's willingness to obstruct the performance of the officers, provided a reasonable suspicion that knocking and announcing before entering to execute the search warrant would be dangerous to the officers.

When deference is given to the commissioner's decision, this court should affirm the commissioner's decision to authorize the no-knock entry to execute the search warrant; and this court should reverse the court of appeals' decision and direct that the trial court's order suppressing the evidence be reversed.

However, even if this court agrees with the trial court and the court of appeals that the search warrant affidavit failed to provide reasonable suspicion that knocking and announcing police presence would be dangerous, the evidence should not be suppressed for two reasons: first, there was not a sufficient causal relationship between the police failure to announce and the discovery of the evidence to warrant suppression of the evidence; and second, because the police acted in good faith reliance on the search warrant's authorization to make a no-knock entry, the evidence should be admissible under the good faith exception to the exclusionary rule.

II. EVEN IF THE OFFICERS FAILED TO COMPLY WITH THE RULE OF ANNOUNCEMENT, THE EVIDENCE SEIZED IN THE EXECUTION OF THE SEARCH WARRANT SHOULD NOT BE SUPPRESSED SINCE THERE IS NO CAUSAL RELATIONSHIP BETWEEN THE OFFICERS' MISCONDUCT AND THE SEIZURE OF THE EVIDENCE.

The defendant moved to suppress all evidence seized in the execution of the search warrant because the officers violated the United States and Wisconsin Constitutions when they made a no-knock entry to execute the search warrant (8:1, 3).

The state's position is that, even if the officers violated the United States and Wisconsin Constitutions by failing to comply with the rule of announcement, the evidence should not be suppressed since there is no causal relationship between the officers' misconduct and the seizure of the evidence. Both the United States and the Wisconsin Constitutions are implicated because both require compliance with the rule of announcement.

In *Wilson v. Arkansas*, 514 U.S. 927, 929 (1995), the Court held that compliance with the rule of announcement was a constitutional requirement because the rule formed a part of the reasonableness inquiry under the Fourth Amendment. In *State v. Ward*, 2000 WI 3, 231 Wis. 2d 723, ¶55, 604 N.W.2d 517, the court held that, because art. I, § 11 of the Wisconsin Constitution is essentially identical to the Fourth Amendment and because this court normally interprets the Wisconsin search and seizure provisions consistently with the requirements of the United States Constitution as interpreted by the Supreme Court, the rule of announcement is one part of the reasonableness inquiry under art. I, § 11 of the Wisconsin Constitution, in conformity with the Supreme Court's decision in *Wilson*.

A violation of the Fourth Amendment does not require suppression of evidence unless there is a causal relationship between the police conduct that constituted the violation and the seizure of the evidence.

The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands. *Arizona v. Evans*, 514 U.S. 1, 10 (1995), and *United States v. Leon*, 468 U.S. 897, 906 (1984). The issue of exclusion is separate from the issue of whether the Fourth Amendment has been violated. *Evans*, 514 U.S. at 13, and *State v. Phillips*, 218 Wis. 2d 180, 577 N.W.2d 794 (1998). Thus, it is not appropriate to apply the exclusionary rule to suppress evidence every time the Fourth Amendment is violated.

Evidence should not be suppressed unless there is a sufficient causal relationship between the police misconduct that constituted the Fourth Amendment violation and the discovery of the evidence to warrant suppression; that is, unless the evidence was the fruit of police misconduct. *United States v. Ramirez*, 118 S. Ct. 992, 997 n.3 (1998), and *Segura v. United States*, 468 U.S. 796, 815 (1984). The United States Supreme Court stressed this point in *Segura*, 468 U.S. at 815, when it said:

> By the same token, our cases make clear that evidence will not be excluded as "fruit" unless the illegality is at least the "but for" cause of the discovery of the evidence. Suppression is not justified unless the "challenged evidence is in some sense the product of illegal governmental activity."

In *Ramirez*, 118 S. Ct. 997 n.3, the Court explained that, after a Fourth Amendment violation is found, the courts should decide whether "there was sufficient causal relationship between" the conduct that constituted the Fourth Amendment violation "and the discovery of the" evidence "to warrant suppression of the evidence" before suppressing evidence. *See People v. Stevens*, 597 N.W.2d

53, 60 (Mich. 1999), *cert. denied sub nom. Stevens v. Michigan*, 120 S. Ct. 1181 (2000).

In *Nix v. Williams,* 467 U.S. 431, 444 (1984), the Court acknowledged that the causal connection between police misconduct and the discovery of the evidence is the first question to be addressed in determining whether the exclusionary rule applies to evidence. Quoting from *United States v. Crews*, 445 U.S. 463, 471 (1980), the Court said in *Nix*, 467 U.S. at 444, that cases implementing the exclusionary rule "'begin with the premise that the challenged evidence is *in some sense* the product of illegal governmental activity.'" In *New York v. Harris*, 495 U.S. 14, 19 (1990), the Court said that suppression of the evidence is not a proper remedy for a constitutional violation where "the evidence was not '"come at by exploitation" of . . . the defendant's Fourth Amendment rights.'"

In a dissenting opinion in *Harris*, Justice Marshall explained that the principal purpose of the exclusionary rule is to eliminate incentives for police officers to violate the Fourth Amendment and he noted: "A police officer who violates the Constitution usually does so to obtain evidence that he could not secure lawfully." *Harris*, 495 U.S. at 22 (Marshall, J., dissenting). In other words, the exclusionary rule does not serve its purpose if it is applied to evidence that the police are on a course to obtain legally.

In this case, because the evidence was found during the execution of the search warrant, a police failure to comply with the rule of announcement before the entry was not the "but for" cause of the discovery of the evidence; that is, the evidence was not the fruit of the illegal police conduct. Therefore, the evidence should not be suppressed even if the police failed to comply with the rule of announcement.

The Wisconsin Court of Appeals has agreed with the state that police officers' failure to announce is not the

cause of the evidence being seized when the police are executing a valid search warrant; but the court of appeals excluded the evidence anyway to deter police misconduct. In *State v. Stevens*, 213 Wis. 2d 324, 335, 570 N.W.2d 593 (Ct. App. 1997), after concluding that the no-knock entry was illegal, the court said the state was "correct that the manner of the entry did not cause the evidence to be seized"; but the court excluded the evidence to deter police misconduct. The court of appeals in this case reaffirmed this decision. *See Eason*, 234 Wis. 2d 396, ¶¶9-10.

While the court of appeals in *Stevens* correctly concluded that the manner of entry did not cause the evidence to be seized, the court erred in suppressing the evidence to deter police misconduct. As made clear by the United States Supreme Court in *Ramirez*, *Segura*, *Crews* and *Harris*, evidence should be suppressed to deter police misconduct only when the evidence is the fruit of the misconduct. The decision in *Stevens* to suppress evidence that was not the fruit of police misconduct is wrong because it is in conflict with decisions of the United States Supreme Court. The court of appeals and the Wisconsin Supreme Court are required to follow the decisions of the United States Supreme Court on Fourth Amendment related issues because neither the court of appeals nor the Wisconsin Supreme Court can impose greater restrictions on police activity as a matter of federal constitutional law than the United States Supreme Court imposes. *Oregon v. Hass*, 420 U.S. 714, 719 (1975).

Because the evidence seized in *Stevens* and in this case was the product of the search warrant and not the police officers' failure to knock and announce, there was not a sufficient causal relationship between the police misconduct and the discovery of the evidence to justify suppression of the evidence under the test recognized in *Ramirez*, 118 S. Ct. at 997 n.3. *See also United States v. Tavarez*, 995 F. Supp. 443, 449 (S.D.N.Y. 1998) ("[E]ven when a Fourth Amendment violation has occurred, evidence will not be excluded unless a causal relationship

exists between the particular violation at issue and the discovery of the evidence sought to be excluded").

The Michigan Supreme Court acknowledges that the United States Supreme Court requires a causal relationship between a Fourth Amendment violation and the seizing of the evidence before evidence is suppressed. *See Stevens*, 597 N.W.2d at 60. The court held that exclusion of the evidence was not the proper remedy for a violation of the rule of announcement. *See People v. Stevens*. The court explained in *Stevens*, 597 N.W.2d at 64:

> It was not the means of entry that led to the discovery of the evidence, but, rather, it was the authority of the search warrant that enabled the police to search and seize the contested evidence. Therefore, the searching and seizing of the evidence was independent of failure to comply with the "knock and announce" statute.

The Michigan Supreme Court then held that the trial court had erred in suppressing the evidence because of a violation of the Fourth Amendment. *See Stevens*, 597 N.W.2d at 64.

In a later case, the Michigan court said that exclusion of the evidence is not the appropriate remedy even where there was a violation of the knock-and-announce requirement. *See People v. Vasquez*, 602 N.W.2d 376, 379 (Mich. 1999).

The United States Court of Appeals for the Seventh Circuit has recognized the necessity of a causal relationship between the constitutional violation and the discovery of the evidence in order to suppress the evidence. In *United States v. Kip Jones*, 214 F.3d 836, 837 (7th Cir. 2000), the defendant asked the court to suppress the evidence because the officers acted in an unreasonable manner in entering to execute a search warrant when they unnecessarily used a battering ram, they threw an explosive device into the apartment and they tackled the defendant when he did not immediately

drop to the floor. In denying the defendant's request to suppress the evidence, the court did not even decide whether there had been a Fourth Amendment violation because "the exclusionary rule depends on causation" and "[a] warrant authorized the entry, so seizure of evidence was inevitable." *Jones*, 214 F.3d at 838. The court said that the officers' errors (if they were errors), did not lead to suppression, citing *United States v. Dennis Jones*, 149 F.3d 715 (7th Cir. 1998).

In *United States v. Dennis Jones*, the court found that the police conduct satisfied Fourth Amendment requirements; but the court stated that when a constitutional violation occurs, the causal relationship is required before the evidence can be suppressed:

> A causal link between unlawful police conduct and a seizure is necessary but not sufficient to justify the exclusion of reliable evidence. . . . It is hard to understand how the discovery of evidence inside a house could be anything but "inevitable" once the police arrive with a warrant; an occupant would hardly be allowed to contend that, had the officers announced their presence and waited longer to enter, he would have had time to destroy the evidence. See *Segura*, 468 U.S. at 816, 104 S.Ct. 3380.

Jones, 149 F.3d at 716-17.

As recognized by the court in *Dennis Jones* and in *Kip Jones*, 214 F.3d at 838, it cannot be suggested that, for suppression purposes, the evidence was a product of the police illegality just because the occupants of the residence could have destroyed the drugs if the police had complied with the rule of announcement before entering. Because the Supreme Court said in *Segura*, 468 U.S. at 816, and in *Ker v. California*, 374 U.S. 23, 39 (1963), that there is no constitutional right to destroy evidence and that the exclusionary rule will not be extended to protect the destruction of evidence, the defendant cannot argue that the evidence was the product of police illegality just because the failure to announce deprived him of an opportunity to destroy the evidence. *See also United*

States v. Husband, 2000 WL 1185513, *13 (7th Cir. 2000) ("The exclusionary rule is not designed to reward the destruction of evidence").

The state is not contending that the exclusionary rule would never apply after a no-knock entry. It is appropriate to apply the rule when evidence is obtained through exploitation of the illegal conduct. An example of such a situation is *United States v. Ramirez*, 91 F.3d 1297 (9th Cir. 1996), *rev'd,* 118 S. Ct. 992 (1998), where the court of appeals concluded that the police had made an illegal no-knock entry to execute an arrest warrant for a suspect who the police believed was visiting at the residence. When the resident heard people breaking into his house, he grabbed a gun to defend himself. The police arrested him for being a felon in possession of a gun. In that case, if the no-knock entry had been illegal, it could have been proper to suppress the gun because, if it had been stored in a cabinet or drawer, the police would probably have had no authority to seize it in the execution of the arrest warrant; and the police would have learned of the gun only because of their failure to comply with the rule of announcement.

There are at least three situations where the court already refuses to exclude evidence even though there has been a violation of the Fourth Amendment. In those situations, the court has not found it necessary to apply the exclusionary rule to deter police misconduct.

When the police find evidence while conducting a search beyond the scope of the warrant, the court normally suppresses only the evidence that was seized beyond the scope of the warrant. *See State v. Petrone*, 161 Wis. 2d 530, 548-49, 468 N.W.2d 676 (1991), and *State v. Noll*, 116 Wis. 2d 443, 458-60, 343 N.W.2d 391 (1984). *See also Waller v. Georgia*, 467 U.S. 39, 43 n.3 (1984) ("The Georgia Supreme Court found that all items that were unlawfully seized were suppressed. In these circumstances, there is certainly no requirement that lawfully seized evidence be suppressed as well").

Therefore, the court normally does not suppress the evidence seized within the scope of the warrant as a way to deter police from acting beyond the scope of the warrant in the future.

Another case demonstrating that the court should suppress only the evidence seized as a result of the illegal part of a search is *Conrad v. State*, 63 Wis. 2d 616, 218 N.W.2d 252 (1974). Acting only on the sheriff's hunch, fourteen to fifteen holes were dug in search of Marie Conrad's body on the Conrad farm in locations from under the doghouses adjacent to the house to the area 450 feet from the house where the body was discovered. *Id.* at 618-21.

The supreme court concluded that the body was admissible into evidence because it had been found in the open fields about 450 feet from the home; and, under the open fields doctrine, that area was not protected by the Fourth Amendment. *Id.* at 634. The court pointed out that, if the body had been found in the curtilage near the home, the evidence would have been suppressed. *Id.* The exclusionary rule provided Conrad no remedy for the holes the sheriff dug within the curtilage since no evidence was found in those holes. The court did not suppress the evidence found in the open field as a way to deter the police from digging the holes in the curtilage.

A similar result should apply if the police fail to comply with the rule of announcement when executing a valid search warrant. As in *Conrad*, the evidence found in the valid part of the search (the execution of the search warrant) should be admissible. Only the evidence that is the product of the failure to comply with the rule of announcement should be suppressed.

The attenuation doctrine, which allows the admission of evidence even though police have engaged in misconduct at some point prior to the evidence being obtained, *Phillips*, 218 Wis. 2d at 205-06, provides another example of a situation where evidence is not

suppressed even though it was obtained at a point in time after the police violated the Fourth Amendment. In *Phillips*, 218 Wis. 2d at 204-05, the court explained that, under the attenuation doctrine, the evidence is admissible because there was a break in the causal chain between the illegality and the seizure of the evidence. In other words, the evidence is not excluded even though the illegality was a distant cause of the seizure of the evidence.

In the case of an arrest in violation of the Fourth Amendment and art. I, § 11, the exclusionary rule provides no remedy for the defendant unless the police obtained evidence as fruit of the illegal arrest. *See State v. Smith*, 131 Wis. 2d 220, 235, 240-41, 338 N.W.2d 601 (1986). In other words, unless the illegal arrest has a casual relationship to evidence seized by the police, the exclusionary rule provides no remedy for the illegal arrest.

In summary, even if the police violated the Fourth Amendment by failing to comply with the rule of announcement in this case, the evidence was not the product of the failure to comply with the rule; that is, the evidence was not the product of the police misconduct. The evidence was found in the execution of a search warrant and was the product of the search warrant. Because the evidence was not the fruit of illegal government conduct, the evidence should not be suppressed. *Ramirez*, 118 S. Ct. at 997 n.3; and *Segura*, 468 U.S. at 815.

Suppression of the evidence is also not an appropriate remedy for a violation of art. I, § 11 of the Wisconsin Constitution. The rule of announcement was found to be a part of the reasonableness inquiry under art. I, § 11 to be in conformity with the Fourth Amendment. *See Ward*, 231 Wis. 2d 723, ¶55. Therefore, the remedy for a violation of art. I, § 11 should also be in conformity with the remedy for a violation of the Fourth Amendment. Just as in the case of a Fourth Amendment violation, evidence should not be suppressed for a violation of art. I, § 11 unless there is a causal relationship between the

conduct that constitutes the violation and the seizure of the evidence. Indeed, in *Hoyer v. State*, 180 Wis. 407, 193 N.W. 89 (1923), the court indicated that the exclusionary rule should be applied only when the police misconduct caused the evidence to be seized. For example, the court said that the state should not be able to use evidence that is "the *result of its own violation* of its own fundamental charter"; and the court was critical of the argument that when the state itself has violated its own pledges it may "use the *results thereby obtained* for its own purpose." *Hoyer*, 180 Wis. at 417 (emphasis added). The court's references to the results of the violations indicates the court's intention to apply the exclusionary rule only when the police misconduct caused the evidence to be discovered and seized.

The court of appeals in this case erred in suppressing the evidence to deter police misconduct when there was no causal relationship between the police misconduct in failing to comply with the rule of announcement and the seizure of the evidence under the authority of the search warrant. *See Eason*, 234 Wis. 2d 396, ¶¶9-10. Neither the exclusionary rule adopted in *Hoyer* nor the exclusionary rule that enforces the Fourth Amendment is employed unless the police misconduct causes the evidence to be discovered and seized; that is, unless the evidence is the product, or result, of the police misconduct. Because the evidence in this case was seized in the execution of the valid search warrant and not as a result of the police officers' failure to comply with the rule of announcement, the evidence should not be suppressed for a violation of the Fourth Amendment or art. I, § 11 of the Wisconsin Constitution.

III. BECAUSE THE NO-KNOCK ENTRY WAS AUTHORIZED BY THE SEARCH WARRANT, EVIDENCE SEIZED IN THE EXECUTION OF THE WARRANT IS ADMISSIBLE UNDER THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE EVEN IF THE WARRANT AFFIDAVIT FAILED TO SUPPLY SUFFICIENT INFORMATION TO JUSTIFY THE NO-KNOCK ENTRY.

A. The good faith exception applies to a Fourth Amendment violation.

If the court finds that the warrant affidavit failed to provide sufficient information to justify a no-knock entry and the court finds that there was a causal relationship between the officers' failure to comply with the rule of announcement and the seizure of the evidence, the evidence is still admissible under the good faith exception to the exclusionary rule.

Because both the Fourth Amendment and art. I, § 11 make compliance with the rule of announcement part of the reasonableness inquiry under the respective provisions, *see Ward*, 231 Wis. 2d 723, ¶¶40, 55, it is necessary to determine whether the good faith exception applies to the exclusionary rule that enforces each constitution.

Where the Fourth Amendment has been violated, this court is required to apply the good faith exception under the circumstances where the United States Supreme Court would apply it because this court cannot impose greater restrictions on police activity as a matter of federal constitutional law than the United States Supreme Court imposes. *Oregon v. Hass*, 420 U.S. 714, 719 (1975).

In *Leon*, the Supreme Court "ruled that the Fourth Amendment exclusionary rule does not apply to evidence obtained by police officers who acted in objectively

reasonable reliance upon a search warrant issued by a neutral magistrate, but where the warrant was ultimately found to be unsupported by probable cause." *Illinois v. Krull*, 480 U.S. 340, 342 (1987). In this case, the police were objectively reasonable in relying on the search warrant that authorized the no-knock entry. Therefore, under *Leon*, for a violation of the Fourth Amendment, the good faith exception to the exclusionary rule dictates that the evidence seized in the execution of the warrant be admissible.

Even under *Leon*, however, the good faith exception would not apply if the warrant-issuing magistrate had abandoned his detached and neutral role, if the police officer was dishonest or reckless in preparing the affidavit, or if the police could not have harbored an objectively reasonable belief in the existence of reasonable suspicion. *Leon*, 468 U.S. at 926.

In this case, there is no indication that the court commissioner abandoned his neutral and detached role or that Fahrney was dishonest or reckless in preparing the affidavit. Finally, in light of the law cited in section I. of this brief, the police were entitled to harbor an objectively reasonable belief in the existence of reasonable suspicion and they could reasonably believe that the no-knock authorization in the warrant was supported by reasonable suspicion.

Under *Leon*, therefore, the police acted in good faith reliance on the search warrant authorization in making the no-knock entry to execute the search warrant. This court should apply the good faith exception to the exclusionary rule for a warrant-authorized no-knock entry that violates the Fourth Amendment just as other courts have applied or expressed their willingness to apply the good faith exception when search warrants authorized the no-knock entries.

In *United States v. Tisdale*, 195 F.3d 70, 73 (2nd Cir. 1999), the court applied the good faith exception and said

that "regardless of the existence of exigent circumstances, the officers were entitled to rely on the no-knock provision of the warrant in good faith." The courts also applied the good faith exception to warrant-authorized no-knock entries in *United States v. Rivera*, 2000 WL 761976, *3 (D. Me. 2000), and *United States v. Brown*, 69 F. Supp. 2d 518, 520-21 (S.D.N.Y. 1999). In other cases, the courts expressed the willingness to apply the good faith exception to warrant-authorized no-knock entries but did not have to reach that point in those cases. *See United States v. Mattison*, 153 F.3d 406, 411 n.4 (7th Cir. 1998); *United States v. Hawkins*, 139 F.3d 29, 32 (1st Cir. 1998); and *United States v. Tavarez*, 995 F. Supp. 443, 448-49 (S.D.N.Y. 1998).

As in the above cited cases, in this case, the objectively reasonable police officer could rely on the search warrant authorization for the no-knock entry. Under these circumstances, the officers acted in good faith in making the no-knock entry authorized by the warrant. Therefore, the evidence seized in the execution of the warrant is admissible even if the entry was in violation of the reasonableness inquiry of the Fourth Amendment.

B. A good faith exception to the exclusionary rule that enforces the Wisconsin Constitution should be adopted and applied in this case.

Even if this court finds that the good faith exception to the federal exclusionary rule would allow the evidence to be admitted after a violation of the Fourth Amendment, this court has the authority to refuse to adopt a good faith exception for the exclusionary rule that is applied after violations of the Wisconsin Constitution. *State v. Tompkins*, 144 Wis. 2d 116, 132, 423 N.W.2d 823 (1988). Nevertheless, this court should apply the good faith exception in the same situations where the United States Supreme Court would apply it, which includes search warrant authorizations for no-knock entries, to be

consistent with the rationale employed in *Ward*, 231 Wis. 2d 723, and because of the following reasons: the wording of the Fourth Amendment and art I, § 11 of the Wisconsin Constitution; the basis on which the court adopted a Wisconsin exclusionary rule in *Hoyer v. State*, 180 Wis. 407, 193 N.W. 89 (1923); and this court's policy of consistently conforming the law under art. I, § 11 to Fourth Amendment law.

In *Ward*, the judge who authorized the no-knock entry and the officers who made the entry acted in reliance on the blanket rule approved in *State v. Stevens*, 181 Wis. 2d 410, 511 N.W.2d 591 (1994), and *State v. Richards*, 201 Wis. 2d 845, 549 N.W.2d 218 (1996), that permitted the police to always make a no-knock entry to execute a search warrant for evidence of drug dealing. *See Ward*, 231Wis. 2d 723, ¶¶40-41. Three months after the search of Ward's home, the United States Supreme Court issued its opinion in *Richards v. Wisconsin*, 520 U.S. 385 (1997), that disapproved of the blanket rule. As a result, the search of Ward's home was in violation of the Fourth Amendment under the *Richards v. Wisconsin* decision. In *Ward*, 231 Wis. 2d 723, ¶42, the question concerned the appropriate remedy when evidence is seized in conformance with controlling law as articulated by the Wisconsin Supreme Court that is subsequently reversed.

This court concluded that, consistent with *Illinois v. Krull*, 480 U.S. 340 (1987), even though there had been a violation of the Fourth Amendment, the evidence was admissible because the police acted in good faith reliance upon the pronouncements of this court and because no remedial purpose would be achieved through exclusion of the evidence when the officers and the magistrate followed the rule of law. *See Ward*, 231 Wis. 2d 723, ¶¶51-52.

The court also concluded that, even though the no-knock entry had violated art. I, § 11 of the Wisconsin Constitution, the evidence was admissible under the Wisconsin Constitution because the "officers acted in

reliance upon pronouncements of this court" and because "exclusion of the evidence would serve no remedial objective." *Id.*, at ¶¶62-63.

As will be seen, the rationale employed in *Ward* (to admit the evidence when the police acted in good faith reliance upon a court decision and when no remedial purpose would be served by excluding the evidence) is consistent with the rationale employed in *Leon* for the Supreme Court's good faith exception. Because the reasoning of the two cases is the same, the good faith exception adopted in *Leon* should be adopted in Wisconsin for the exclusionary rule that enforces art. I, § 11 of the Wisconsin Constitution.

The development of search and seizure law in Wisconsin supports a continued conformity of Wisconsin law to the Fourth Amendment law so that the good faith exception should be adopted for the Wisconsin exclusionary rule.

This court stated in *Hoyer*, 180 Wis. at 411, that art. I, § 11 is identical with the Fourth Amendment. In *Phillips*, 218 Wis. 2d at 195, the court noted: "But for a few inconsequential differences in punctuation, capitalization, and the use of the singular or plural form of a word, the texts of the Fourth Amendment and art. I, § 11 are identical."

There is some indication that art. I, § 11 was drafted with the intention of being the same as the Fourth Amendment. The section was part of the declaration of rights drafted by the constitutional convention in 1847-48. As originally introduced on December 22, 1847, section 11 read:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrants to search any place or seize any person or thing shall issue without describing, as near as may be, nor

> without probable cause, supported by oath or affirmation.

Journal and Debates of the 1847-48 Constitutional Convention, reprinted in State Historical Society of Wisconsin, *The Attainment of Statehood* 228 (M. Quaife ed. 1928).

On January 22, 1848, the committee on revision and arrangement suggested several changes in the declaration of rights. *Id.* at 713-16. Among other things, the committee redrafted art. I, § 11 to track the language of the Fourth Amendment. *Id.* at 714. The change was made to use words "that conveyed the meaning most fully and as were most generally used in constitutional law." *Id.* at 715.

By selecting words that "were most generally used in constitutional law," the drafters showed an intent to conform the meaning of Wisconsin's search and seizure provision to that generally accorded other provisions using those same words. Drafting art. I, § 11 to be like the Fourth Amendment is consistent with the reason given in *Ash v. Commonwealth*, 236 S.W. 1032, 1035 (Ky. Ct. App. 1922), for the adoption of search and seizure provisions in state constitutions. *Ash* was one of the cases that had followed the federal exclusionary rule and with whom this court elected to stand in *Hoyer*, 180 Wis. at 413, 415. In *Ash*, 236 S.W. at 1035, the court explained that, because the Fourth Amendment was a limitation only upon the federal authorities, "the respective states adopted similar provisions in their Constitutions for the protection of their citizens against arbitrary power exercised by the state."

This court has consistently and routinely conformed the law of search and seizure under the Wisconsin Constitution to that developed by the United States Supreme Court under the Fourth Amendment. *See Ward*, 231 Wis. 2d 723, ¶55; *State v. O'Brien*, 223 Wis. 2d 303, 316-17, 588 N.W.2d 8 (1999); *Phillips*, 218 Wis. 2d at

195; *State v. Richards*, 201 Wis. 2d at 850-51; *Tompkins*, 144 Wis. 2d at 131; and *State v. Fry*, 131 Wis. 2d 153, 172, 388 N.W.2d 565 (1986).

This court's adoption in *Hoyer* of an exclusionary rule to enforce art. I, § 11 was one example of this court routinely and consistently conforming Wisconsin search and seizure law to that developed under the Fourth Amendment. Before *Hoyer* was decided in 1923, there was no rule that prevented the state from using evidence that had been obtained in violation of the defendant's rights under the Fourth Amendment and art. I, § 11. In 1914, in *Weeks v. United States*, 232 U.S. 383 (1914), the United States Supreme Court held that evidence obtained through a search and seizure that violated the Fourth Amendment could not be used in a federal prosecution. *See Wolf v. Colorado*, 338 U.S. 25, 28 (1949). When *Hoyer* was decided in 1923, the *Weeks* exclusionary rule was not applicable to Wisconsin law enforcement officers or state courts because the Fourth Amendment had not yet been held applicable to the states. In *Wolf* in 1949, the United States Supreme Court for the first time held that the Fourth Amendment was enforceable against the states through the Fourteenth Amendment. *See Mapp v. Ohio*, 367 U.S. 643, 650 (1961); and *Wolf*, 338 U.S. at 27-28. However, the exclusionary rule that enforced the Fourth Amendment was not made applicable to the states until the *Mapp* decision in 1961. *Mapp*, 367 U.S. at 655.

To provide Wisconsin residents the same protection under art. I, § 11 of the Wisconsin Constitution that they enjoyed under the Fourth Amendment, the court in *Hoyer* adopted the same exclusionary rule to enforce the Wisconsin Constitution that the federal courts employed to enforce the Fourth Amendment. *See Hoyer*, 180 Wis. at 412-13, 415. The exclusionary rule adopted in *Hoyer* is a judge-made rule rather than a personal right under the Wisconsin Constitution. *See Ward*, 231 Wis. 2d 723, ¶¶57-58. In *Hoyer*, 180 Wis. at 413, 415, the court elected to stand with federal and state courts in adopting an exclusionary rule. However, the states with whom this

court elected to stand all relied on federal cases in adopting an exclusionary rule. *See Youman v. Commonwealth,* 224 S.W. 860, 862-67 (Ky. Ct. App. 1920); *People v. Marxhausen*, 171 N.W. 557, 566-73 (Mich. 1919); *Tucker v. State*, 90 So. 845, 845-48 (Miss. 1922); *Hughes v. State*, 238 S.W. 588, 590-94 (Tenn. 1922); and *State v. Peterson*, 194 P. 342, 352-54 (Wyo. 1920).[1] Because the state cases all relied on the federal law, it was accurate for this court to state in *Tompkins*, 144 Wis. 2d at 134, that this court in *Hoyer* had accepted and applied the United States Supreme Court's decisions to interpret art. I, § 11 of the Wisconsin Constitution. The court also noted in *Tompkins*, 144 Wis. 2d at 135, that "the interpretation of the Wisconsin Constitution in *Hoyer* was based exclusively upon federal cases, particularly United States Supreme Court decisions interpreting the fourth amendment."

Adopting a good faith exception to the Wisconsin exclusionary rule is consistent with the rationale in *Hoyer* because adopting the good faith exception would keep the application of the Wisconsin exclusionary rule consistent with the federal rule. Not only is keeping the two exclusionary rules consistent with *Hoyer*, it is in compliance with this court's consistent and routine practice of conforming Wisconsin search and seizure law to that developed under the Fourth Amendment. Because this court in *Ward*, 231 Wis. 2d 723, ¶55 made the rule of announcement part of the reasonableness inquiry under

[1]Of the states cited in *Hoyer*, three have not decided whether to adopt the good faith exception. *See Stringer v. State*, 491 So. 2d 837 (Miss. 1986) (three concurring justices would reject the good faith exception, but the lead opinion did not address the question); *State v. Carter*, 16 S.W.3d 762, 768 n.8 (Tenn. 2000); and *Southworth v. State*, 913 P.2d 444, 449 (Wyo. 1996). Kentucky has adopted the good faith exception. *See Crayton v. Commonwealth*, 846 S.W.2d 684 (Ky. 1992). The Michigan Supreme Court has not addressed the question of the good faith exception; and, based on the difference of opinion expressed by the three judges in *People v. Hellis*, 536 N.W.2d 587 (Mich. Ct. App. 1995), it is not clear whether the Michigan Court of Appeals has rejected or remains undecided on the good faith exception.

art. I, § 11 to conform to the Fourth Amendment, the application of the exclusionary rule for a violation of art. I, § 11 should conform to the exclusionary rule for the Fourth Amendment; and the good faith exception to the Fourth Amendment exclusionary rule should be adopted for the Wisconsin exclusionary rule.

Applying a good faith exception to the Wisconsin exclusionary rule is consistent with the desire to avoid conflicting rules, which was a motivation for the United States Supreme Court to hold the Fourth Amendment exclusionary rule applicable to the states. *See Mapp*, 367 U.S. at 657-58. If Wisconsin courts and the federal courts reach different conclusions on the application of the good faith exception to their respective exclusionary rules, evidence that is inadmissible in state courts can be turned over to federal authorities for use in federal prosecutions. The United States Supreme Court sought to avoid such a double standard. *See Mapp*, 367 U.S. at 658.

In light of this court's criticism of the exclusionary rule in *Conrad*, 63 Wis. 2d at 634-39, and in light of this court's practice of interpreting the Wisconsin search and seizure law to conform to Fourth Amendment law, this court should apply the good faith exception to the Wisconsin exclusionary rule. In *Conrad*, 63 Wis. 2d at 637, this court suggested that it would change the exclusionary rule if not prevented from doing so by the *Mapp* decision. Therefore, to the extent that United States Supreme Court decisions permit this court to adopt a good faith exception to the exclusionary rule, this court should do so to remain consistent with the rationale of *Hoyer* and the criticism of the exclusionary rule in *Conrad*.

In *Conrad*, 63 Wis. 2d at 635, the court pointed out that the rationale of the exclusionary rule was twofold: first, to deter police misconduct; and, second, to insure integrity in the judicial process. However, judicial integrity has a limited role in determining whether to apply the exclusionary rule in a particular context. *See Ward*, 231Wis. 2d 723, ¶48.

Discussing the deterrence rationale, the United States Supreme Court has said that the application of the exclusionary rule should be restricted to those situations where its remedial purpose is effectively advanced. *Evans*, 514 U.S. at 11; *Krull*, 480 U.S. at 347; and *Leon*, 468 U.S. at 908. The exclusion of evidence is not effective unless it alters the behavior of individual law enforcement officers or the policies of their departments; but the rule should not be applied to deter objectively reasonable law enforcement activity. *Leon*, 468 U.S. at 918-19. In *Leon*, 468 U.S. at 919, quoting *United States v. Peltier*, 422 U.S. 531, 539 (1975), the Court explained that the deterrence rationale loses much of its force when the police act in good faith. Again quoting from *Peltier*, 422 U.S. at 542, the Court in *Leon*, 468 U.S. at 919, said that evidence should be suppressed only when the police could be charged with knowledge that their action was unconstitutional:

> "If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

Where the officers' conduct is objectively reasonable, excluding the evidence can in no way affect their future conduct unless it makes them less willing to do their duty. *Evans*, 514 U.S. at 11-12; *Krull*, 480 U.S. at 349; and *Leon*, 468 U.S. at 920.

This court in *Ward*, 231 Wis. 2d 723, ¶61, used the same quote from *Peltier* that was cited above from *Leon* and held that evidence should not be suppressed under the Wisconsin Constitution when the police act in compliance with pronouncements of this court.

Thus, in *Ward*, this court employed the same rationale used by the United States Supreme Court in adopting the good faith exception. Consistent with the reasoning in *Ward*, this court should adopt the good faith

exception approved in *Leon* and hold that evidence is admissible when the police act on the basis of a search warrant approved by the neutral and detached magistrate. As in *Ward*, when the police rely in an objectively reasonable manner on warrant approval for their actions, they cannot be charged with knowledge that their actions are unconstitutional.

The integrity of the judicial process, the other purpose of the exclusionary rule, is not soiled by adopting the good faith exception. In *Conrad*, 63 Wis. 2d at 636, the court noted that the integrity of the trial courts as searchers for the truth is seriously compromised if they are required to suppress relevant evidence when the exclusionary rule is not accomplishing its deterrent purpose. The exclusionary rule does not accomplish its purpose, and the court's integrity is compromised, when excluding evidence cannot deter police conduct. Thus, the court's integrity is compromised if the good faith exception to the Wisconsin exclusionary rule is not adopted, since relevant evidence would be suppressed even when police conduct was not being deterred by the exclusionary rule.

In summary, in this case the purposes of the exclusionary rule are not served by excluding evidence since the police executed a no-knock search warrant in a manner approved by the judicial officer who signed the warrant. In making a no-knock entry to execute the search warrant, the police acted in objectively reasonable reliance on the no-knock search warrant. Because the federal courts would apply the good faith exception to evidence seized under the authority of the search warrant issued in this case, the good faith exception should also be applied to the Wisconsin exclusionary rule. The evidence seized in this case, therefore, is admissible against the defendant.

CONCLUSION

For the reasons discussed above, the State of Wisconsin asks this court to conclude that the evidence seized in the execution of the search warrant was admissible into evidence, to reverse the decision of the court of appeals, and to direct that the matter be remanded to the trial court so that the case may proceed to trial.

Dated this 12th day of October, 2000.

JAMES E. DOYLE
Attorney General

STEPHEN W. KLEINMAIER
Assistant Attorney General
State Bar No. 1014422

Attorneys for Plaintiff-Appellant-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8908

CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font. The brief contains 10,961 words.

STEPHEN W. KLEINMAIER

A P P E N D I X

INDEX TO APPENDIX

COURT OF APPEALS
DECISION
DATED AND FILED

March 23, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 98-2595-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

RAYSHUN D. EASON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Rock County: EDWIN C. DAHLBERG, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

¶1 EICH, J. The State of Wisconsin appeals from an order suppressing evidence seized by police while executing a no-knock search warrant at an apartment occupied by the defendant, Rayshun Eason and various other people. The trial court suppressed the evidence on grounds that the search warrant

affidavit failed to justify a no-knock search. The State argues on appeal that the affidavit was sufficient and, even if it were not, we should still reverse the suppression order because: (1) there was no causal relationship between the officers' no-knock entry into the apartment and discovery of the seized evidence; or, alternatively, (2) the evidence should be admissible in any event under the "good-faith exception" to the exclusionary rule articulated by the United States Supreme Court in *United States v. Leon*, 468 U.S. 897 (1984). We affirm.

¶2 The warrant in question authorized the police to enter the apartment without knocking or otherwise announcing their appearance, and to search the premises for cocaine and other controlled substances and associated paraphernalia. Present in the apartment, among others, were Eason, his aunt, Shannon Eason, and an acquaintance, Clinton Bentley. After breaking into the apartment unannounced, police found a cache of drugs and Eason was eventually charged with possession of cocaine and with intent to deliver. He moved to suppress evidence of the drugs, arguing to the circuit court that they were seized in violation of his Fourth Amendment rights. Specifically, he claimed that the warrant's no-knock authorization was unjustified because the affidavit for the warrant failed to establish a reasonable suspicion that knocking and announcing their presence before entering would have placed the officers in danger. The State argued that the affidavit was adequate and, in the alternative, the evidence should be ruled admissible under the *Leon* good-faith exception to the exclusionary rule. The court disagreed and suppressed the evidence.

¶3 On review of the grant or denial of a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. *State v. Eckert*, 203 Wis. 2d 497, 518, 553 N.W.2d 539 (Ct. App. 1996). However, the application of constitutional principles to the found facts is a

question of law which we decide independently, without deference to the circuit court's decision. *State v. Patricia A.P.*, 195 Wis. 2d 855, 862, 537 N.W.2d 47, 49-50 (Ct. App. 1995).

¶4 In *Richards v. Wisconsin*, 117 S. Ct. 1415, 1421-22 (1977), the Supreme Court held that, in order for police executing a search warrant to make an unannounced, or "no-knock," entry to the premises,

> [they] must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime ....

¶5 The State points to the following portion of the affidavit in support of its argument that it meets the "reasonable suspicion" requirement:

> Your affiant has checked the criminal histories of both Clinton Bentley and Shannon Eason and in so doing has learned that BENTLEY was arrested by the Belvidere Illinois Police Department in 1989 for AGGRAVATED ASSAULT. Your affiant also learned that EASON has been arrested for such things as larceny (nine times), Obstructing (three times), and ASSAULT (twice).

¶6 "The[se] arrests," says the State, "demonstrate the willingness of two apartment occupants to use violence," thus placing the officers' safety at risk should their presence be made known to the occupants ahead of time. It also points to the affiant's statement elsewhere in the affidavit that, based on his experience and training as a police officer, he was aware that persons involved in "drug related crimes often arm themselves with weapons, including firearms and sometimes use those weapons against the police."[1]

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[1] In *State v. Meyer*, 216 Wis. 2d 729, 755, 576 N.W.2d 260 (1998), the Wisconsin Supreme Court, applying the rule articulated in *Richards v. Wisconsin*, 117 S. Ct. 1415 (1977), (continued)

¶7 The circuit court agreed with the State that the threshold of proof in such situations is low—and noted that courts owe great deference to the determination of reasonable suspicion by the magistrate issuing the warrant, *see* ***State v. Kerr***, 181 Wis. 2d 372, 379, 511 N.W.2d 586 (1994)—but concluded that the affidavit in this case did not reach that "limited threshold."

¶8 Our independent review of the affidavit in light of the above-stated principles, leads us to agree with the circuit court. We don't believe Bentley's nine-year-old arrest for an offense which may or may not have involved violent conduct or possession of weapons—and which may or may not have resulted in a conviction—establishes a reasonable likelihood that the officers' safety might have been endangered had they knocked and announced prior to entering the apartment. Like Eason, we think it is equally reasonable to assume that the reason no conviction was uncovered by the officer drafting the affidavit was that Bentley may have been released as the "wrong man." The same is true with respect to the affidavit's allegations regarding Shannon Eason—that she had been arrested in the past for larceny, obstructing an officer and assault. There is no information as to when and where those arrests took place, or whether they involved any violent acts—and, again, whether a conviction followed. The affidavit doesn't assert that either Bentley or Shannon Eason—or any of the other occupants of the apartment—were armed; it merely offers a general statement that drug-related crimes often involve weapons. The affidavit simply doesn't assert facts giving rise to a reasonable suspicion that the officers' announced entry into the apartment would have placed them in danger.

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noted that, "in determining whether reasonable suspicion exists, an officer's training and prior experience in similar situations may be considered in combination with the particular facts."

¶9 As indicated, the State also maintains that neither the circuit court nor this court can suppress the evidence without first determining that there was a "causal relationship" between the failure to knock and the discovery of the evidence. We flatly rejected that argument in *State v. Stevens*, 213 Wis. 2d 324, 570 N.W.2d 593 (Ct. App. 1997), on the basis that its acceptance would nullify what we considered to be an important deterrent against unconstitutional conduct by police. We said:

> While the State is correct that the manner of the entry did not cause the evidence to be seized, the only effective deterrent to unconstitutional "no-knock" entries is to suppress the evidence. If we were to recognize the right without providing an effective remedy, we would once again give the police a blanket rule to effect unannounced entries. We are unwilling to permit this basic right to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment (internal quotations omitted).
>
> ....
>
> Any alternative short of suppression would not sufficiently deter law enforcement from executing unannounced entries.
>
> The rights we seek to vindicate are not trivial ones. *See* ***Richards***, 117 S. Ct. at 1421 n.5 ("the individual interests implicated by an unannounced, forcible entry should not be unduly minimized"). Respect for the sanctity of the home was so highly regarded by our founding fathers that it was enshrined in the Bill of Rights: "The right of the people to be secure in their ... houses ... against unreasonable searches and seizures, shall not be violated." UNITED STATES CONST. amend. IV. Likewise, Wisconsin has affirmed the "right of the people to be secure in their ... houses ... against unreasonable searches" for as long as it has been a state. WISCONSIN CONST. art. I, § 11. We again emphasize that the "no-knock" entry is a particularly violent intrusion into the home. Although we are sympathetic to the plight of the police involved in drug raids, we are unwilling to permit unconstitutional intrusions to go without an effective sanction.

Id. at 335-37.

¶10 The State directs our attention to the United States Supreme Court's opinion in a more recent case, ***United States v. Ramirez***, 118 S. Ct. 992 (1998), which, according to the State, adopts the causal-relationship requirement and thus trumps ***Stevens*** and requires reversal of the order in this case. We disagree. The only mention of "causation" in ***Ramirez*** is an isolated remark in a footnote:

> Because we conclude that there was no Fourth Amendment violation, we need not decide whether, for example, there was sufficient causal relationship between the [officers' entry] and the discovery of the [evidence] to warrant suppression....

Id., 118 S. Ct. at 997 n.3. The statement, by its own "we need not decide" language, is unquestionably a *dictum*. The Court expressly determined that there was no Fourth Amendment violation—e.g., that the officers' entry was proper—and disclaimed any consideration or application of a "causation" rule. And even if the Court's remark may be interpreted as recognizing that causation may be a question in some instances, it was neither deciding nor applying any such rule in ***Ramirez***. We believe ***Stevens*** controls the issue.

¶11 Finally, the State argues that even if we conclude that there was a Fourth Amendment violation, the evidence seized should still be admissible under ***Leon***, where the Court refused to apply the exclusionary rule to evidence obtained by law enforcement officers acting in objectively reasonable reliance upon a search warrant which was later ruled invalid for lack of probable cause. *Id.* at 922. The State says the same rule should apply here, where the police, in breaking into the apartment, acted in good-faith reliance on the no-knock authorization in the warrant.

¶12 In the fifteen years since ***Leon*** was decided, the Wisconsin Supreme Court has never squarely faced the issue. The court had another opportunity this

term in ***State v. Ward***, 2000 WI 3, 231 Wis. 2d 723, 604 N.W.2d 517. In that case officers made an "unlawful no-knock entry" into Ward's residence. According to the supreme court, existing case law at the time the case arose countenanced such action, and the fact that those cases had since been overruled should not result in suppression of the evidence. In so ruling, the court never mentioned ***Leon***, concluding instead that because the officers had relied on then-existing "pronouncements of this court," exclusion of the seized evidence "would serve no remedial objective." ***Ward***, 2000 WI 3 at ¶63.[2]

¶13 We said in ***State v. Grawien***, 123 Wis. 2d 428, 432, 367 N.W.2d 816 (Ct. App. 1985)—and in several subsequent cases—that for us to follow ***Leon*** would effectively overrule an earlier supreme court case, ***Hoyer v. State***, 180 Wis. 407, 193 N.W. 89 (1923), where the court held that the Wisconsin Constitution required suppression of illegally-obtained evidence; and we emphasized that that is something we may not do.[3] We have followed that principle in several subsequent cases in which we have been asked to adopt the ***Leon*** rule. *See, e.g.*, ***State v. DeSmidt***, 151 Wis. 2d 324, 333, 444 N.W.2d 420 (Ct. App. 1989), *rev'd on other grounds*. We do so here, concluding once again that "[i]f the exclusionary rule stated in ***Hoyer*** is to be overruled, that is a function of our supreme court." ***DeSmidt***, 151 Wis. 2d at 333 (citation omitted).

By the Court.—Order affirmed.

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[2] The dissenters in ***State v. Ward***, 2000 WI 3, 231 Wis. 2d 723, 604 N.W.2d 517, noted that, in their opinion, the majority "studiously avoid[ed]" any reference to ***Leon***, 468 U.S. 897 (1984), despite its status as "the leading good faith case." ***Ward***, 2000 WI 3 at ¶81 (Abrahamson, C.J., dissenting).

[3] Indeed, we noted in ***State v. Grawien***, 123 Wis. 2d 428, 432, 367 N.W.2d 816 (Ct. App. 1985), that the supreme court itself has recognized that overruling ***Hoyer v. State***, 180 Wis. 407, 193 N.W. 89 (1923), would be a necessary corollary to following ***Leon***.

Recommended for publication in the official reports.

STATE OF WISCONSIN ROCK COUNTY CIRCUIT COURT BRANCH IV

STATE OF WISCONSIN,

Plaintiff,

FINDINGS AND ORDER

v.

CASE NO. 98CF1620

RAYSHUN D. EASON,

Defendant.

This cause having come on for hearing the 17th day of July, 1998, on the defendant's motion to suppress evidence based on a defective search warrant, the court having heard the arguments of the parties and having examined the search warrant, the court having heard the arguments of the parties and having examined the search warrant and supporting affidavit finds:

1. The affidavit for search warrant fails to allege the requisite reasonable suspicion to justify the issuance of a no knock search warrant.

2. Since the search warrant was executed after the United State Supreme Court ruling in Richards v. Wisconsin 117 S. Ct. 1416 (1997) the good faith exception does not apply.

Therefore, the court orders:

All evidence obtained as a result of the execution of the search warrant dated April 28, 1998, fir the premises at 802 Bluff Street, Beloit, Wisconsin is suppressed.

Dated this 4th day of September, 1998.

BY THE COURT:

Honorable Edwin C. Dahlberg
Circuit Court Judge, Branch IV
Rock County, Wisconsin

'98 SEP 4 PM 0 50
CLERK OF CIRCUIT COURT
CIRCUIT COURT - BELOIT
ROCK COUNTY, WI
FILED

Approved as to form by:

Attorney Jeff Livingston
findord.rde

18-1

STATE OF WISCONSIN CIRCUIT COURT, BRANCH 4 ROCK COUNTY

- -

STATE OF WISCONSIN,

Plaintiff,

CASE NO. 98CF1620

VS.

RAYSHUN EASON,

Defendant.

- -

TRANSCRIPT OF PROCEEDINGS

Transcript of Proceedings of Suppression Motion Hearing in the above-entitled action before the HONORABLE EDWIN C. DAHLBERG, Circuit Judge, Branch 4, Rock County Circuit Court, Beloit, Wisconsin, commencing on the 17th day of July, 1998.

APPEARANCES:

State of Wisconsin, Plaintiff, appearing by Assistant District Attorney GERALD A. URBIK, 250 Garden Lane, Beloit, Wisconsin 53511.

The defendant, RAYSHUN D. EASON, appearing in proper person.

Attorney JEFFREY E. LIVINGSTON, 634 BlackHawk Boulevard, South Beloit, Illinois 61080, representing the defendant.

Dolores M. Smudde, CP, RPR, CM
Court Reporter

JULY 17, 1998

P R O C E E D I N G S

THE COURT: Mrs. Reporter, this is in the matter of the State of Wisconsin versus Rayshun Eason.

The proceedings are in file 98CF1620. Mr. Urbik appears in behalf of the State, Mr. Livingston appears in behalf of the defendant.

You are ready to proceed, gentlemen?

MR. URBIK: Yes, your Honor.

MR. LIVINGSTON: Yes, your Honor. Your Honor, to complete the record, I had thought that I had provided a copy of the search warrant and the affidavit with my motion, and apparently, after a review, I have not, and I would ask leave to file it.

THE COURT: There was nothing in there. I was going to read it -- the 27th of April, 1998. This warrant was issued apparently after the Richards case in the U.S. Supreme Court. That was decided in April of '97; wasn't it?

MR. URBIK: I believe so, your Honor.

THE COURT: So, the issue is whether or not there are a sufficient basis to authorize a no-knock warrant. Is that the only issue?

MR. LIVINGSTON: Yes, your Honor.

MR. URBIK: Your Honor, in reviewing the

reports, there may be an issue of standing I may need to raise, depending on how the Court rules on this issue, which would require an evidentiary hearing. I am prepared to argue the search warrant issue at this time.

THE COURT: Well let me read the affidavit. Then you can argue as to whether -- this is not a case where they entered no-knock, because of the exigent circumstances that existed at the time that they went to execute it; is it? It's strictly a case of whether or not the affidavit authorized, or is sufficient to have authorized the Commissioner in issuing the search warrant. That's the only issue, as I understand it. Is that right?

MR. URBIK: As to the warrant, I believe that's correct, Judge.

THE COURT: All right. I will read it and then you can argue. I haven't seen it before. (Pause) All right. As I understand it, gentlemen, there is no question that there was probable cause to issue a warrant. The only question is whether or not the affidavit would justify the Commissioner in issuing a no-knock warrant.

MR. LIVINGSTON: That's correct.

THE COURT: And I would agree that there is probable cause for the issuance of a warrant. What is

your position as to whether or not the affidavit would be sufficient to allow the Commissioner to properly issue a no-knock warrant, Counsel?

MR. LIVINGSTON: Your Honor, as the Court is aware, in order to obtain a no-knock search warrant, the Magistrate has to have information that there is danger to the officers if they do knock and announce their presence, or a possibility that the -- the items to be seized would be easily destroyed.

And if you review the affidavit for the search warrant, the first paragraph just indicates that there is two pieces of intelligence that Clinton Bentley is a drug dealer. Paragraph 1-A discloses a controlled buy that had happened at the location within 72 hours of the -- of the execution of the warrant, or the request for the warrant. And there was no indication in that controlled buy there was any weaponry at 802 Bluff Street, the location of the warrant.

Paragraph 2 just indicates Shannon Eason is responsible for utilities.

Paragraph 3 is just an indication that Clinton Bentley resided at that location.

Paragraph 4 indicates the past records, however, no indication that either one has been arrested in the past for a weapons charge.

There is an aggravated assault from 1989, an arrest out of Illinois, for Mr. Bentley, but no indication that involved any weapons, or involved police officers. Shannon Eason was arrested for property crimes, and assault, and an obstructing -- or three obstructings.

And then the rest of the affidavit is just boiler-plate language.

There is no specific information at this location that there might be weapons or guns involved, and there is no specific information that the property would be destroyed. All of that is required by the Supreme Court, the U.S. Supreme Court, in overruling the Wisconsin Supreme Court, in, I believe it was Richards.

THE COURT: Mr. Urbik, how do you respond?

MR. URBIK: Your Honor, I think the -- both the United States Supreme Court and the Wisconsin Supreme Court now made it clear that in order to obtain a no-knock authorization, the affidavit must state specific facts which would provide a reasonable grounds for a police officer to believe that they would be in danger, or evidence would be likely to be destroyed if they required -- would be required to knock and announce.

However, I think both the United States Supreme Court and the Wisconsin Supreme Court have indicated that that is a minimal showing that has to be made. It is

comparable to a Terry stop, where the officer has reasonable suspicion to believe that the person would be -- the person would present a danger to himself.

I don't believe there is any requirement in order to meet that standard that there has to be a showing there were weapons kept in the house, or that one of the occupants is likely to have a weapon. I think the affidavit, when it states that both the -- the two subjects who were actually in the house at the time the search warrant was executed, have convictions for violent offenses, meets the minimal showing that I believe the Courts are requiring, the specific facts, albeit, minimal facts, which do present the officers with a reasonable belief to believe that they would be endangered, not necessarily by a weapon, but by the conduct of the occupants of the residence.

I also believe that even if the Court could conclude the -- concluded that the affidavit did not provide that reasonable basis to execute the no-knock, that the good faith exception would apply.

I realize that the search warrant was executed after the Richards decision was decided by the United States Supreme Court. However, I think good faith extends beyond that situation. I think under Leon, U.S. versus Leon, the standard is whether or not the police acted in

good-faith reliance on the search warrant. And I think in this case, the police did act in good-faith reliance on Court Commissioner Meyer's approval of the no-knock search warrant. They did try to comply with the requirements of showing specific facts to justify the no-knock authorization.

Even if this Court concludes that that showing was not sufficient to justify the no-knock authorization, I don't believe that it can be said that the police should have known that the information that they were provided in the information was not a sufficient justification such that they did not act in good-faith reliance on the -- Court Commissioner Meyer's approval of the no-knock provision. I think the fact that they did put specific facts regarding the prior violent, either convictions or arrests for two of the occupants in the residence, shows they did try to comply with the Richards decision, and they in good faith relied on that determination by Court Commissioner Meyer when they executed the search warrant.

So I believe under either -- in either case, whether or not there was -- if this Court concludes that there was not a justification for the no-knock authorization, the Court could still conclude that the police acted in good faith reliance on that warrant and deny the motion

to suppress.

THE COURT: Mr. Livingston, any rejoinder?

MR. LIVINGSTON: Briefly, your Honor. First of all, regarding U.S. v. Leon, the majority of the states asking to adopt that good-faith exception have neglected to do so. The Supreme Court for Wisconsin has not adopted U.S. v. Leon, and I think that it -- this is not the case that, where the good faith exception should -- should be applied.

In his first comments, Attorney Urbik had indicated there was evidence of convictions of violent offenses. He did fix that later, and say, convictions or arrests, in the affidavit. And the arrest of Mr. Bentley listed in the affidavit was from 1989 in Illinois, and is listed as an aggravated assault. I am not sure that there is a companion charge to that in Wisconsin, and I am not sure that that gives enough information that police officers would be endangered. That's nine years ago and in another state. And presumably, to check Mr. Bentley's record everywhere, they found that one, and that's all they could come up with.

The Shannon Eason violent arrest that's mentioned, it says, assault, twice, but there is no indication where, when that occurred, to whom it occurred, if there was a conviction; no other information is listed.

And I agree that the standard for the no-knock is minimal. But there is a standard, your Honor, and there has to be some showing that officers would be endangered if they knocked and announced, and it's just not in this affidavit.

THE COURT: Well, the Richards case, decided by the U.S. Supreme Court, held that the Wisconsin Supreme Court in Richards, when they decided that general allegations as to the fact that drug dealers may be armed and that there was always a danger that the controlled substances would be destroyed, was not enough; that there had to be some specific allegations. And the District Attorney is right, and they don't have to have very much in order to get over the threshold of the specific allegations that there is reason to believe that the persons inside may be armed and may use weapons to defend themselves against the police, and also -- or, also, information to the effect that there is reason to believe that specific facts from which it could be inferred, there was reason to believe that the substances might be disposed of if a no-knock were not here.

This affidavit does give probable cause for the issuance of the search warrant. But even with the limited threshold required by the U.S. Supreme Court in Richards, it does not reach that plateau. And I can only

conclude that the Commissioner erred in this particular case in issuing a warrant with a no-knock provision.

It's my understanding that it was executed as a no-knock. I understand the District Attorney's argument as to good faith. I have heard it before. But our Supreme Court has yet to adopt Leon. There is one -- I believe there is only one case where the Court of Appeals arguably bought the good-faith argument. But I don't think good faith will get us out. And unless and until the Supreme Court adopts Leon -- and they haven't done so as of this date to my knowledge, so -- the motion is well taken. It is granted. The substances seized as a result of the no-knock warrant are suppressed.

There is a question that you wish to raise, however, as to whether this particular defendant can rely on the violation of the no-knock law, Mr. Urbik?

MR. URBIK: Yes, your Honor. I do believe that would require an evidentiary hearing.

THE COURT: As to whether he has any standing to complain, even though the Court has ordered that the no-knock warrant was issued improperly?

MR. URBIK: That's correct, your Honor.

THE COURT: And that the good-faith exception does not save it as -- is that raised in these pleadings?

MR. LIVINGSTON: It was not raised by the

response of the State, your Honor.

MR. URBIK: Your Honor, this was a new issue that was brought to my attention after I submitted my response.

THE COURT: You are alleging that this defendant has no standing to raise the issue?

MR. URBIK: That's correct, your Honor.

THE COURT: And he has no standing that it makes no difference what the Court's decision was on the other matter?

MR. URBIK: That would be my position, your Honor.

MR. LIVINGSTON: Your Honor, it would be our position that the State has waived that issue.

THE COURT: Do you have any comment there, Mr. Urbik?

MR. URBIK: Your Honor, I don't seem to have a copy of Defense Counsel's motion, but I believe my reading of it was that the defendant was attacking the search warrant for lack of probable cause, and that's what I was responding to. I did not --

THE COURT: Well, I found that the no-knock execution was improper, and that the evidence should be suppressed on that basis.

MR. URBIK: That seems to be --

THE COURT: You are alleging that the defendant in this matter has no standing to object to th fact that it was a no-knock entry?

MR. URBIK: Yes, your Honor. I believe the thrust of the motion was on the basis of insufficient affidavit, and that's what I responded to in the response. So I believe I should be given at least the opportunity to raise the issue.

THE COURT: Well, you can bring a motion to request that the Court allow the evidence against this defendant. It won't be against those who had standing t do it, and apparently, Mr. Bentley and Ms. Eason are those people.

MR. URBIK: That's correct. Mr. Bentley entered a guilty plea to the charge, a similar charge, however, and he waived his right to appeal that, and he waived --

THE COURT: Well, that issue -- well, but if you bring a motion that the Court ruled in this matter that this is not binding upon Rayshun Eason, that he did not have standing to raise the issue that his constitutional rights were violated, then I would have t schedule an evidentiary hearing and determine that, I suppose. There is a motion in limine, but we don't have to take that up at this time; do we?

MR. LIVINGSTON: No, your Honor.

THE COURT: There is a demand for speedy trial. We had better put it on for speedy trial.

MR. LIVINGSTON: We have a trial date scheduled, your Honor.

THE COURT: It's already scheduled for calendar call?

MR. LIVINGSTON: Right. Calendar call September 8th, and trial, September 9th.

THE COURT: All right. Then that's taken care of. Everything is done, unless you bring a motion, Mr. District Attorney.

MR. URBIK: Thank you, your Honor.

PROCEEDINGS CONCLUDED.

* * * * * * * * * * *

STATE OF WISCONSIN CIRCUIT COURT ROCK COUNTY

SEARCH WARRANT

THE STATE OF WISCONSIN, to any law enforcement officer of Rock County:

WHEREAS, John Fahrney has this day complained in the attached sworn affidavit, which is incorporated by reference, that on the 28th day of April 1998, in or on the body, property, or premises of 802 Bluff St Apt B located in Beloit, Rock County Wisconsin, there are certain person(s) or property which constitute evidence of, or were concerned in the commission of, the crime(s) of Possession of Controlled Substance With Intent To Deliver/Cocaine contrary to Wisconsin State Statutes 961.41(1m)(cm)1 and SPECIFICALLY, the body, property, or premises to be SEARCHED can be described as follows: 802 Bluff St Apt B is a multi family two story dwelling that is ~~gray~~ Brown in color with white trim. 802 Bluff St Apt B is the upstairs apartment. 802 Bluff is the first house north of Roosevelt Av on the west side of Bluff St. The numerals 802 are attached to the residence above the east door. Further to include curtilage, outbuildings, vehicles and persons on the premises, there are now located and concealed certain things, and SPECIFICALLY, the persons or property to be seized can be described as follows:

Cocaine and other controlled substances, scales, packaging materials, cutting agents, drug paraphernalia, drug ledgers, address/phone records, opened or unopened financial documents relating to drug proceeds, U.S. Currency, and all other instrumentalities, substances or documents which are in violation of Possession of Controlled Substance With Intent To Deliver/Cocaine contrary to Section 961.41(1m)(cm)1 Wisconsin Statutes, and the above named affiant, having prayed that a search warrant be issued.

15-1

NOW, THEREFORE, in the name of the STATE OF WISCONSIN, you are commanded within a reasonable time and not to exceed 5 days (exclusive of date of issuance) to search the above named or described persons(s) or place(s) for the above named or described person(s) or property, and if the same or any part thereof is found, to bring the property and the person(s) in whose possession the property is found before this Court to dealt with according to law, and to return this SEARCH WARRANT within 48 hours to the Clerk of this Court.

Dated this 28th day of April, 1998.

Circuit Judge

A NO KNOCK ENTRANCE IS AUTHORIZED

Yes-SDM

Court Commissioner

ENDORSEMENT ON SEARCH WARRANT

Received by me this 27 day of APRIL, 1998,

at 2:51 o'clock P.M.

Sheriff or Peace Officer

15-2

STATE OF WISCONSIN CIRCUIT COURT ROCK COUNT

AFFIDAVIT FOR SEARCH WARRANT

STATE OF WISCONSIN
County of Rock

WHEREAS, John Fahrney, being first duly sworn, on oath has this day c
plained in writing to said court upon oath that on the 27th da
April, 1998, in Rock County, in and upon certain premises 802 Bluff
Apt B in the City of Beloit, in Rock County, occupied by Shannon E
and Clinton Bentley, and more particularly described as follows:
Bluff St Apt B is a multi family two story dwelling that is gray in co
with white trim. 802 Bluff St Apt B is the first house north of Roose
Ave on the west side of Bluff St. The numerals 802 are attached to
residence directly above the door which faces east. Apt B is an upsta
apartment.

Further to include curtilage, outbuildings, persons and any and all ve
cles pertaining to 802 Bluff St Apt B on or near said premises, th
are now located and concealed certain things, to-wit:

Cocaine and other controlled substances, scales, packaging materi
cutting agents, drug paraphernalia, drug ledgers, address/phone reco
indicia of occupancy, opened or unopened financial documents relatin
drug proceeds, U.S. currency, and any and all other instrumentalit
substances or documents which are in violation of Possession of
trolled Substance With Intent to Deliver/Cocaine contrary to Sec
961.41(1m)(cm) Wisconsin Statutes, and prayed that a search warran
issued to search said premises for said property.

15-3

The facts tending to establish the grounds for issuing a Search Warrant are as follows:

1.) Your affiant further states he is familiar with the confidential files kept by the Beloit Police Department Special Operations Bureau and as a result knows that the Beloit Police Department has received 2 pieces of intelligence indicating that Clinton Bentley is a drug dealer.

a.)Within the past seventy two hours your affiant met with a reliable confidential informant at a pre arranged location. Upon meeting with this reliable confidential informant your affiant searched the reliable confiential informant for controlled substances and U.S. currency and found none. Your affiant provided this reliable confidential informant with less than $100.00 in U.S. currency so the reliable confidential informant could purchase a quantity of cocaine from Clinton Bentley. Your affiant then observed the reliable confidential informant travel directly to 802 Bluff St Apt B. Your affiant also observed the reliable confidential informant leave 802 Bluff St and travel directly back to another prearranged location. Once at this prearranged location the reliable confidential informant gave your affiant a quantity of suspected cocaine that he/she had purchased from Clinton Bentley. The reliable confidential informant was again searched for controlled substances and U.S. currency and again none was found.

Your affiant then went to the Beloit Police Department and tested a sample of the suspected cocaine using the cobalt thiocyanate field test and in doing so your affiant received a postive test for the prescence of

cocaine. The cocaine was then placed into evidence at the Beloit Polic Department.

2.) Your affiant did a subscriber check for the residence at 802 Bluf St Apt B through WP&L and learned that Shannon Eason has been responsibl for the utilities since October 1997.

3.) Your affiant checked Beloit Police computer records which indicat that Clinton Bentley resides at 802 Bluff St. Clinton Bentley was arrest ed in April 1998 and listed 802 Bluff St as his residence.

4.) Your affiant has checked the criminal histories of both Clinto Bentley and Shannon Eason and in doing so has learned that BENTLEY wa arrested by the Belviere Illinois Police Department in 1989 for AGGRAVAT ED ASSAULT. Your affiant also learned that EASON has been arrested fo such things as larceny(nine times),Obstructing(three times), and AS SAULT(twice).

5). Your affiant has been a police officer since 1990 and has participa ed in approximately 70 drug raids. Your affiant is assigned to the Spe cial Operation Bureau and my duties are to investigate complaints of dr trafficking, gang involvement, and other quality of life issues.

Your affiant is a K-9 officer and has had specialized training narcotic detection using the K-9. This training was received at Nor Central Canine Institute in 1992 and has received updated training on yearly basis.

Your affiant has also been involved in the investigations of other serious criminal offenses including, but not limited to, aggravated batteries, burglaries, robberies, sexual assaults, thefts and child abuse offenses.

Your affiant knows through training and experience that short term traffic where controlled substances are transported to and from a drug dealers residence is common and that often times drug dealers who don't reside there are present, arrive or are leaving at the time we execute our search warrants. These drug dealers often have vehicles to transport them that are not owned by them or registered to them. Affiant, based on his training and experience with others in that field believes that where illegal drugs are sold by one person, they are purchased by others and commonly carried on the persons of both. It is also true of locations where drug use takes place, persons commonly carry illegal drugs on their body.

Based on affiant's training, experience and associations with others in those fields, he is aware that persons involved in many illegal activities, including drug related crimes often arm themselves with weapons, including firearms and sometimes use those weapons against the police and others. These persons will also destroy or conceal evidence if given time. Affiant, based on the stated experience, training and association, is aware that a very important factor in controlling persons and in particular, during drug raids, is surprise and speed. Affiant is also aware that control reduces the likelihood of injury to all involved. Affiant is aware that announcement eliminates surprise and provides persons within a residence time to take actions that would require a reaction by

officers. For these reasons affiant requests that a NO KNOCK search warrant be issued.

Dated this 27th day of April, 1998.

WHEREFORE, the said Affiant prays that a Search Warrant be issued t search such premises for the said property, and to bring the property, i found, and the person(s) in whose possession the property is found before the Circuit Court for Rock County, to be dealt with according t law.

John Fahrney

Subscribed and sworn to before me this 27 day of April, 1998.

Sybil D. Mayer

98 2575

STATE OF WISCONSIN COUNTY OF ROCK CRIMINAL COURT BR. IV

THE STATE OF WISCONSIN,

Plaintiff,

vs.

CRIMINAL COMPLAINT

RAYSHUN D. EASON,
dob: 11/30/78

Defendant.

J. Michael Crall, being first duly sworn, on oath says (that he is informed and verily believes) that on the 1st day of May, 1998, at the City of Beloit, in Rock County, the defendant, RAYSHUN D. EASON, did intentionally and feloniously possess with intent to deliver less than 5 grams of cocaine, classified as a Schedule I controlled substance under Section 961.14(7)(a), Wis. Stats., within 1000 feet of a school or park, contrary to Sections 961.41(1m)(cm)1 and 961.49 of the Wisconsin Statutes, and subject to a penalty of a fine of not more than $500,000 or imprisonment not less than 3 years nor more than 15 years or both, and shall have driving privileges suspended/revoked for not less than 6 months nor more than 5 years, 100 hours of community service, and all against the peace and dignity of the State of Wisconsin and prays that the defendant be arrested and dealt with pursuant to and according to law.

That the basis for affiant's allegation is that he is the Court Officer for the Beloit Police Department, and as such has read the reports of Officer Fahrney and McMahon of that department which state:

Officer Fahrney reports that on May 1, 1998, at about 12:07 p.m., he and other Beloit Police Department officers executed a search warrant at 802 Bluff Street, Apt. #2, City of Beloit, Rock County, Wisconsin. Fahrney reports upon entering the residence he could observe subjects running down the hallway away from his and other officers. Fahrney reports the first subject he observed was a person who he later identified as Clinton Bentley. Fahrney reports that he ordered Bentley to place his hands on the back of his head and prior to Bentley doing so he observed Bentley throw a clear plastic baggie behind the bed loca[illegible]ng

the west wall of the living room. Fahrney reports that after handcuffing Bentley he retrieved a clear plastic baggie which he had thrown behind the batter at which time he discovered that it contained several individual packages of what appeared to be crack cocaine. Fahrney reports he turned over the suspected crack cocaine to Officer McMahon. Fahrney reports that several other subjects were located in the residence including a Rayshun Eason, a Shannon Eason, and some small children. Fahrney reports he spoke with Clinton Bentley at the Beloit Police Department at which time Bentley stated that he did reside at 802 Bluff Street, Apt. #2 along with his girlfriend, Shannon Eason, and her three small children. Bentley further indicated that he does sell cocaine but does not sell cocaine from the residence but only on the street. Bentley stated that he had sold cocaine for approximately two to three weeks and had sold in eight ball amounts. Bentley stated that he sold cocaine in $20 and $10 quantities. Bentley stated that the cocaine that Fahrney had located under the bed which Bentley was thrown did, in fact, belong to him and that the cocaine was worth approximately $300. Bentley stated that he did intend on selling the cocaine that was recovered under his bed and that the marijuana which was located on a kitchen table in the living room also belonged to him. Fahrney reports he subsequently spoke with Shannon Eason at the Beloit Police Department who stated that she did reside at 802 Bluff Street, Apt. #2 along with Clinton Bentley and her three children. Eason stated that she did not sell cocaine but Bentley did sell cocaine but not from the residence. Eason stated that Bentley would get paged by subjects and would leave the residence and sell cocaine to them in various locations. Eason stated that she was aware that cocaine was kept in her residence and that she had observed Bentley at the table cutting cocaine up when she arrived home. Eason stated that she also observed Bentley packaging the cocaine into baggie corners that were knotted and tied off and that Eason herself used cocaine at least twice a week. Eason stated that her nephew, Rayshun Eason, had come to her residence from Rockford the previous evening and that he had cocaine with him. Eason stated that Rayshun Eason showed her a quantity of cocaine and asked her if his twenties were bigger than the twenties that Bentley sold. Eason stated that Rayshun Eason had already bagged the cocaine up into individual packages and had them all contained in one plastic baggie. Ms. Eason stated that Rayshun Eason does sell cocaine and that she had previously observed Eason sell cocaine in both Beloit and Rockford.

Officer McMahon reports that on May 1, 1998, about 12:07 p.m., he assisted in the execution of a search warrant at 802 Bluff Street, City of Beloit, Rock County, Wisconsin. McMahon reports upon execution of the search warrant Officer Kumlien approached him and stated that he had found the package of white substance which appeared to be individually packaged pieces of crack cocaine near Rayshun Eason. McMahon reports that there were nine individually wrapped pieces of the suspected cocaine weighing 4.2 grams which did test positive after he applied the cobalt thiocyanate test to one of the packages. McMahon reports that Officer Fahrney also turned over to him another package which contained what appeared to be eighteen rocks of individually packaged pieces of crack cocaine. Fahrney also gave him the wallet that was located on Clinton Bentley which contained $1,119.00. McMahon reports he also located 16.6 grams of what tested to be THC on a counter in the living room. Officer McMahon reports that 802 Bluff Street, Apt. #2 is located within a 1000 feet of a public park or school.

J. Michael Cook
Complainant

Subscribed and sworn to before me
this 4th day of May, 1998.

Ass't. D.A./Judge/Court Commissicner

Approved for filing: for GAU Assistant District Attorney Gerald A. Urbik

I find that probable cause (exists) (~~does not exist~~) that the crime was committed by the defendant and order that he be (held to answer thereto) (~~released forth~~with).

Dated May 4, 1998.

Charles Halbert
~~Judge~~/Court Commissioner

GAU/dl/cf.rde
OCN 98-4321

address: 706 North Winnebago, Rockford, IL 61103

STATE OF WISCONSIN COUNTY OF ROCK CIRCUIT COURT BRANCH 4

STATE OF WISCONSIN,
Plaintiff,

v.

INFORMATION
CASE NO. 98-CF-1620

RAYSHUN D. EASON,
DOB: 7/19/70
Defendant.

I, Gerald A. Urbik, Assistant District Attorney for Rock County, Wisconsin, do hereby inform the Court that on the 1st day of May, 1998, at the City of Beloit, in Rock County, the defendant, RAYSHUND D. EASON, did intentionally and feloniously possess with intent to deliver less than 5 grams of cocaine, classified as a Schedule I controlled substance under Section 961.14(7)(a), Wis. Stats., within 1000 feet of a school or park, contrary to Sections 961.41(1m)(cm)1 and 961.49 of the Wisconsin Statutes, and subject to a penalty of a fine of not more than $500,000 or imprisonment not less than 3 years nor more than 15 years or both, and shall have driving privileges suspended/revoked for not less than 6 months nor more than 5 years, 100 hours of community service, and all against the peace and dignity of the State of Wisconsin.

Dated this 16th day of June, 1998.

Assistant District Attorney
for Rock County, Wisconsin

dl/info.rde

CLERK OF CIRCUIT COURT
98 JUN 16 PM 12 20
ROCK COUNTY, WI - BELOIT
FILED

7-1

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 98-2595-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

RAYSHUN D. EASON,

Defendant-Respondent.

ON REVIEW FROM A DECISION BY THE COURT OF APPEALS AFFIRMING AN ORDER SUPPRESSING EVIDENCE THAT WAS ENTERED IN THE ROCK COUNTY CIRCUIT COURT, THE HONORABLE EDWIN C. DAHLBERG, PRESIDING

BRIEF OF DEFENDANT-RESPONDENT

SUZANNE HAGOPIAN
Assistant State Public Defender
State Bar No. 1000179

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5177

Attorney for Defendant-Respondent

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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 98-2595-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

RAYSHUN D. EASON,

Defendant-Respondent.

ON REVIEW FROM A DECISION BY THE COURT OF APPEALS AFFIRMING AN ORDER SUPPRESSING EVIDENCE THAT WAS ENTERED IN THE ROCK COUNTY CIRCUIT COURT, THE HONORABLE EDWIN C. DAHLBERG, PRESIDING

BRIEF OF DEFENDANT-RESPONDENT

RELEVANT CONSTITUTIONAL PROVISIONS

Art. I, § 11 of the Wisconsin Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ISSUES PRESENTED

1. DID THE WARRANT AUTHORIZE A NO-KNOCK ENTRY IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS WHERE THE ONLY PARTICULARIZED INFORMATION CONTAINED IN THE WARRANT APPLICATION WAS A VAGUE AND STALE REFERENCE TO THE OCCUPANTS' ARREST RECORDS, WHICH REVEALED NOTHING ABOUT WHETHER THE OCCUPANTS HAD A HISTORY OF USING WEAPONS OR HAD EVER ACTED VIOLENTLY TOWARD POLICE?

The circuit court and court of appeals answered "yes" and suppressed evidence seized in the search.

2. SHOULD THIS COURT REJECT THE "CAUSAL RELATIONSHIP" EXCEPTION TO THE EXCLUSIONARY RULE ADVOCATED BY THE STATE BECAUSE IT IS CONTRARY TO PRECEDENT OF THIS COURT AND THE UNITED STATES SUPREME COURT AND WOULD EVISCERATE THE CONSTITUTIONALLY BASED RULE OF ANNOUNCEMENT?

The state did not raise this claim in the circuit court. The court of appeals refused to adopt the exception.

3. SHOULD THIS COURT REJECT THE GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE BECAUSE IT IS INCOMPATIBLE WITH THE RIGHTS GUARANTEED BY THE WISCONSIN CONSTITUTION AND PREMISED ON A WIDELY CRITICIZED AND FLAWED COST-BENEFIT ANALYSIS?

Both the circuit court and court of appeals refused to recognize a good-faith exception to the exclusionary rule under the Wisconsin Constitution.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are warranted.

SUMMARY OF ARGUMENT

Protecting the sanctity of the home is at the very core of the Fourth Amendment to the United States Constitution and art. I, § 11 of the Wisconsin Constitution. Accordingly, the United States Supreme Court has said that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." ***Welsh v. Wisconsin***, 466 U.S. 740, 748 (1984). And this court has long recognized that art. I, § 11 protects the "sacred right" of citizens to be free from "arbitrary invasion and search" of their homes. ***Shall v. Minneapolis, St. P. & S.S.M.R. Co.***, 156 Wis. 195, 201-02, 145 N.W. 649 (1914). When police entry of a home is unlawful, this court has repeatedly held that "the only way" the court can protect that sacred right is to suppress evidence seized in the search of the citizen's home. ***State v. Jaeger***, 196 Wis. 99, 101, 219 N.W. 281 (1928). In this case, the state has placed those constitutional rights on the line.

First, the state defends the no-knock entry into this home by pointing to vague and stale information about the occupants' arrest records, none of which indicates that any occupant had ever possessed a weapon or had ever used force against the police. As shown below, the thin thread on which the state hangs its argument cannot support dispensing with the rule of announcement.

Perhaps recognizing the weakness of its claim that the entry was lawful, the state turns its sights on the exclusionary rule, positing two theories why the evidence need not be suppressed despite a constitutional violation. The first theory, premised on an alleged lack of a "causal relationship" between the failure to knock and the discovery of evidence, fails under both the state and federal constitutions. As shown below, it would render unenforceable the rule of announcement, even though the United States Supreme Court has three times in the last five years re-affirmed its place in the Fourth Amendment. The second theory – a good-faith exception to the exclusionary rule – runs afoul of the Wisconsin Constitution, which this court has interpreted as mandating the suppression of evidence obtained in violation of art. I, § 11.

Seventy-seven years ago, when the state's efforts to enforce a "war on alcohol" through Prohibition laws clashed with the rights guaranteed by art. I, § 11, this court defended the constitution. The court adopted the exclusionary rule, writing that "[n]o statute of limitations has or can run against such guarantees." ***Hoyer v. State***, 180 Wis. 407, 418, 193 N.W. 89 (1923). Today, as the state wages a "war on drugs," this court must continue to protect the rights guaranteed to the people of this state, none of which is more important than the right to be secure in their homes from unreasonable searches and seizures.

ARGUMENT

I. THE NO-KNOCK ENTRY INTO THE EASON HOME VIOLATED THE STATE AND FEDERAL CONSTITUTIONS BECAUSE THE POLICE DID NOT HAVE REASONABLE SUSPICION THAT KNOCKING AND ANNOUNCING THEIR PRESENCE WOULD BE DANGEROUS.

A. The rule of announcement.

In ***Wilson v. Arkansas***, 514 U.S. 927, 934 (1995), the Supreme Court held that the common law principle of announcement is part of the reasonableness inquiry under the Fourth Amendment. The court traced the common law knock and announce rule to the 15th Century and concluded that it has "little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure." Long before ***Wilson***, this court recognized that the rule of announcement applies to the execution of warrants in this state. ***State v. Cleveland***, 118 Wis. 2d 615, 624, 348 N.W.2d 512 (1984), ***citing Morales v. State***, 44 Wis. 2d 96, 106, 170 N.W.2d 684 (1969); ***see also State v. Ward***, 2000 WI 3, ¶ 55, 231 Wis. 2d 723, 751, 604 N.W.2d 517 (rule of announcement is one part of the reasonableness inquiry under art. I, § 11).

The rule of announcement requires police, before forcibly entering a home to execute a search warrant, to announce their identity and purpose and to wait for the occupants to refuse their admittance or have time to open the door. ***State v. Meyer***, 216 Wis. 2d 729, 734 n.4, 576 N.W.2d 260 (1998). The rule serves three important purposes: (1) protecting the individual's privacy in the

home;[1] (2) decreasing the potential for violence by alerting occupants that the officer is legitimately on the premises;[2] and (3) preventing the physical destruction of property by giving the resident the opportunity to admit the officer voluntarily. ***State v. Williams***, 168 Wis. 2d 970, 981-82, 485 N.W.2d 42 (1992).

The rule is not inflexible. In ***Wilson***, 514 U.S. at 936, the court recognized that the rule could give way "under circumstances presenting a threat of physical violence," or "where police officers have reason to believe that evidence would likely be destroyed if advance notice were given." In ***Richards v. Wisconsin***, 520 U.S. 385, 392-94 (1997), the court rejected the blanket exception adopted by this court for felony drug investigations. The court reasoned that "[i]f a *per se* exception were allowed for each category of criminal investigation that included a considerable – albeit hypothetical – risk of danger to officers or destruction of evidence, the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless." ***Id.*** at 394. The court set forth the test for determining whether an unannounced entry was reasonable:

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[1] ***See Hessian v. State***, 196 Wis. 435, 439-40, 220 N.W. 232 (1928), where this court, in ordering evidence suppressed, expressed concern that the "search warrant was executed in a manner that showed complete disregard of defendant's right to privacy." There, a number of officers "rushed" the home in the nighttime while the defendant, his wife, a neighbor and several children were present in the living room.

[2] The dangers of no-knock entries are illustrated by ***State v. Coleman***, 206 Wis. 2d 199, 556 N.W.2d 701 (1996), where an occupant grabbed a rifle, fearing the home was being robbed, and pointed it at the door with intent to defend himself. ***See also Sabbath v. United States***, 391 U.S. 585, 589 (1968)("another facet of the rule of announcement was, generally, to safeguard officers, who might be mistaken, upon unannounced intrusion into a home, for someone with no right to be there").

> In order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime, by, for example, allowing the destruction of evidence.

Id.

In this case, the state claims that the affidavit for the search warrant satisfied the first exception, *i.e.*, the police had reasonable suspicion that knocking and announcing their presence would be dangerous. The state does *not* claim that the police had reason to believe that evidence would be destroyed or that announcing their presence would be futile. The state also does *not* claim that exigent circumstances developed after the police obtained the warrant. Consequently, the only issue is whether the information in the warrant affidavit provided reasonable suspicion that knocking and announcing, under the particular circumstances, would be dangerous. The only thing the state can cite in the affidavit to support its claim of dangerousness is stale and vague information about the occupants' arrest records. As shown below, this information was insufficient and, consequently, the no-knock entry was unreasonable.

B. The warrant application's vague and stale information about the occupants' arrest records did not provide reasonable suspicion that knocking and announcing would be dangerous.

The state bears the burden of establishing that particular facts stated in the search warrant application provided reasonable suspicion that knocking and announcing would be dangerous. ***Meyer***, 216 Wis. 2d at 751. Whether the state has met that burden is a question of law reviewed *de novo*. ***Id.*** at 746.

According to the warrant application, a confidential informant made a controlled buy of cocaine within 72 hours from Clinton Bentley at the apartment to be searched (15:4). Records showed that Shannon Eason was responsible for the apartment's utilities (15:5). The warrant application did not state the amount of cocaine purchased but noted that less than $100.00 was exchanged (15:4). The application contained no information that Bentley or Shannon Eason possessed a weapon or had made any threats. There was no indication of firearms or other weapons in the residence. To justify the no-knock entry, the state relies on information in the application about the arrest records of Bentley and Shannon Eason, as follows:

> Your affiant has checked the criminal histories of both Clinton Bentley and Shannon Eason and in doing so has learned that BENTLEY was arrested by the Belviere Illinois Police Department in 1989 for AGGRAVATED ASSAULT. Your affiant also learned that EASON has been arrested for such things as larceny (nine times), Obstructing (three times), and ASSAULT (twice).

(15:5). Nothing in the record suggests that the officers discovered weapons of any sort when they executed the no-knock warrant.

The lower courts were right. The vague and stale information about the occupants' arrest records was insufficient to justify a no-knock entry. The state attacks those rulings by first arguing that mere risk of pain or physical impairment is sufficient to trigger the danger exception to the knock and announce rule. As shown below, the state's contention is inconsistent with how courts have described the danger exception in cases dating from the 1800s through ***Richards***. The state then attacks the court of appeals' decision by asserting that it means arrest records could never provide reasonable suspicion of danger. The state both misconstrues the decision and misses the point. Arrest records either alone

or combined with other information might be sufficient. But, as shown below, the state cannot point to another case in which arrest records were deemed sufficient without information showing that the suspect had previously used, threatened to use or at least possessed a dangerous weapon. Here, the arrest records stand in isolation and are devoid of any information showing that Bentley or Shannon Eason had any history of using firearms or had ever had an altercation with, or in any way threatened the safety of, a police officer.

1. To dispense with the rule of announcement, the danger must be substantial, which typically means armed resistance.

The state understates the level of danger that must be shown to dispense with the rule of announcement. As the state notes, courts have held that exigent circumstances exist if police are "in peril of bodily harm." ***See, e.g., Miller v. United States***, 357 U.S. 301, 309 (1958). But the state goes astray by defining bodily harm to include nothing more than physical pain or impairment. The case law makes clear that the danger must be substantial, which typically means there is reason to believe the police will be met with armed resistance.[3]

The supreme court has recognized that "while drug investigation frequently does pose special risks to officer

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[3] In most cases where no-knock entries have been found reasonable, at a minimum police had information linking firearms to the premises to be searched or to its occupants. However, in ***United States v. Jewell***, 60 F.3d 20, 23-24 (1st Cir. 1995), the court affirmed a no-knock entry where police knew there was a Pit Bull in the apartment and the suspect had an extensive history of arrest and conviction for violent crimes. That holding, though unusual, is consistent with ***State v. Bodoh***, 226 Wis. 2d 718, 595 N.W.2d 330 (1999), where this court held that a dog, in that case, a Rottweiler, can constitute a "dangerous weapon" within the meaning of Wis. Stat. § 939.22(10).

safety and the preservation of evidence, not every drug investigation will pose these risks *to a substantial degree*." ***Richards***, 520 U.S. at 393 (emphasis added). In ***Wilson***, 514 U.S. at 936, the court cited two cases from the 1800s as examples where the common law rule of announcement gave way because of the threat of physical violence. In the first, ***Read v. Case***, 4 Conn. 166, 170 (1822), the individual "had resolved ... to resist even to the shedding of blood ...." In the other, the court queried: "While he was firing pistols at them, were they to knock at the door, and to ask him to be pleased to open it for them?" ***Mahomed v. The Queen***, 4 Moore 239, 247, 13 Eng. Rep. 293, 296 (P.C.1843). The Supreme Court cited ***Read*** in ***Miller***, upon which the state relies, to illustrate the meaning of the phrase "in peril of bodily harm." ***Miller***, 357 U.S. at 309. Consequently, the history of the common law rule of announcement shows that the danger must be substantial and typically that means the use of firearms. The modern cases confirm that construction of the danger exception to the knock and announce rule.

The state cites ***Moore v. State***, 650 So. 2d 958 (Ala. Crim. App. 1994), ***cert. denied***, 514 U.S. 1017 (1995), as support for its construction of "bodily harm" (state's brief at 10). Although ***Moore*** refers to the "peril of bodily harm" and cites ***Miller***, it holds that when the state seeks to use safety concerns to excuse compliance with the knock and announce requirement:

> 'the government must show that the police had concrete, particularized evidence that reasonably led them to believe that (1) there were weapons on the premises and (2) there was a realistic possibility that the occupant or occupants would use the weapons against them.'

Moore, 650 So. 2d at 963, ***quoting Poole v. United States***, 630 A.2d 1109, 1118 (D.C. App. 1993). The focus on weapons makes sense, of course, because an unarmed person would pose little, if any, danger to armed police officers executing a search warrant.

Concern that a prison escapee would use weapons against the police justified a no-knock entry in ***United States v. Ramirez***, 118 S. Ct. 992, 995 & 997 (1998). There, the police had information the escapee had access to a large supply of weapons, vowed he would not "do federal time" and previously threatened to kill witnesses and police officers. In ***Williams***, 168 Wis. 2d at 977 & 985, exigent circumstances existed where the defendant possessed both firearms and large quantities of drugs, had indicated that he would use the guns to defend himself and was previously convicted of a violent crime. ***See also United States v. Maxwell***, 25 F.3d 1389, 1395 (8th Cir. 1994)(exigent circumstances where drug suspect had just purchased a handgun, had a prior felony conviction for assault with use of a weapon and was overheard discussing the assaults he committed); ***United States v. Hawkins***, 139 F.3d 29, 31-32 (1st Cir. 1998)(safety concerns justified no-knock warrant where suspect had recently threatened a neighbor with a gun, had numerous prior convictions for violent offenses involving weapons and was aware of police interest in him).

These cases highlight what is missing here: any reason to believe the occupants of the Eason apartment had weapons to use against the police. In ***Ramirez***, ***Williams***, ***Maxwell*** and ***Hawkins***, the police had information about the suspect's violent history *and* information that the suspect had a firearm *and* information that the suspect had used or threatened to use a weapon against others. Here, the police had no information linking a weapon to the apartment or any occupant. The arrest records show assaults but nothing to indicate the use of weapons. Moreover, as shown below, an assault, even an aggravated assault, would have involved conduct amounting to something less than a battery. There is no information in the warrant providing reasonable grounds to believe that when executing the warrant at the Eason apartment, the officers would be met with armed resistance.

2. The arrest records revealed nothing about whether the occupants had a history of using weapons or had ever acted violently toward police.

Contrary to the state's claim, the court of appeals' decision does not preclude the possibility that arrest records might provide reasonable suspicion that knocking and announcing would be dangerous. The problem is that the arrest records cited in this warrant application revealed nothing about the likelihood that the occupants of the Eason apartment owned and would use firearms against the police. Nor did the records show that either had ever acted violently toward police.

The state has not cited, and Mr. Eason is not aware of, any case in which arrest records were relied upon to justify a no-knock search without information showing that the suspect had a history of using firearms either against police or to commit crimes. Here, the arrest records of Bentley and Shannon Eason fail to in any way link either to a firearm or other weapon.

In each of the no-knock cases cited by the state (state's brief at 12), the suspect had a history of illegal firearm use. In ***Thompson v. Mahre***, 110 F.3d 716, 718 (9th Cir. 1997), the suspect's arrest record included an arrest the year before for armed robbery and another arrest during which he had reached for a gun. In addition, police had information that the suspect had been tipped off about the raid, giving him time to arm himself. ***Id.*** at 722. Exigencies exited in ***United States v. Reilley***, 224 F.3d 986, 989 (9th Cir. 2000), where police were executing an arrest warrant for armed bank robberies against a suspect involved in 27 bank robberies and a car-jacking, all of which were committed while using a gun. In affirming the no-knock entry, the court found it significant that at the scene the suspect may have been alerted to the officers' presence by the shouts from a

companion. ***Id.*** at 991. Finally, in ***People v. Henderson***, 58 Cal. App. 3d 349, 355-56, 129 Cal. Rptr. 844 (1976), the arrest record "indicated the use of firearms by the defendant," revealed a prior altercation with police during which he was carrying a firearm and a prior narcotics arrest when he tried to destroy the evidence.[4] The arrest records in these cases contained critical detail that is absent here. In each, the records not only showed that the suspect had a history of possessing firearms but that he used the weapons to commit violent crimes or threaten the safety of police.

Information in the warrant application about the occupants' arrest records is skeletal. It says the officer "checked the criminal histories" of Bentley and Shannon Eason (15:5), but it does not indicate the source of the information or any specifics on which to gauge its reliability. There is no indication that any of the arrests led to a single conviction. In addition, the application includes no dates for Shannon Eason's arrests and the sole arrest cited for Bentley dates from 1989. ***Compare United States v. Lucht***, 18 F.3d 541, 550-51 (8th Cir. 1994), ***cert. denied***, 513 U.S. 949 (1994)(no-knock entry to search for drugs unreasonable where police relied, in part, on a criminal record consisting of a nine-year-old misdemeanor drug conviction and a 13-year-old weapons charge); ***State v. King***, 736 N.E.2d 921, 925 (Ohio Ct. App. 1999)(fact suspect had firearm in his possession during execution of search warrant in 1996 "bears little, if any connection to whether [he] might be armed during the execution of the search warrant in ... 1998"). Most significantly, the application is devoid of any facts about

[4] The state also cites ***State v. Jones***, 274 N.W.2d 273, 276 (Iowa 1979), which does not involve a no-knock entry. There, the court held that exigent circumstances permitted the police to enter an apartment to make an arrest because, among other factors, the individual was suspected of committing a felony involving the use of force. ***Id.***

the prior arrests that showed either occupant had a history of using weapons or acting violently toward police.

Information that Shannon Eason was twice arrested for "assault" and Bentley was arrested once for "aggravated assault" reveals little without any facts underlying the arrests. Bentley's arrest apparently occurred in Illinois; the location of Eason's is not specified. Under Illinois law, an assault is a misdemeanor involving conduct that does not even arise to the level of a battery. 720 ILCS 5/12-1; ***People v. Abrams***, 271 N.E.2d 37, 45 (Ill. 1971)(any touching or other physical contact is a battery, not an assault).[5] Consequently, pointing a finger at and threatening to kill another is an assault, ***People v. Kelly***, 701 N.E.2d 114, 115 (Ill. App. Ct. 1998), as are verbal threats made while standing a few inches from another after screaming at the person from a distance. ***People v. Rynberk***, 415 N.E.2d 1087, 1092 (Ill. App. Ct. 1980). An assault becomes aggravated if it is committed under specified circumstances ranging from use of a weapon, to the type of victim, *e.g.*, a teacher or bus driver, to whether it occurred on public property. 720 ILCS 5/12-2(a)(1) to (15); ***see, e.g.***, ***People v. Childs***, 711 N.E.2d 1151, 1159-60 (Ill. App. Ct. 1999)(threatening gestures toward attorney at jail constituted aggravated assault because occurred on public property). Depending on the circumstance, aggravated assault may be a misdemeanor. 720 ILCS 5/12-2(b).

If the warrant application had described a recent arrest for aggravated assault involving the use of a weapon or an arrest during which the occupant reached for a weapon or made threats, this case would look different. But vague references to arrests for assault, which are either stale or altogether undated, are plainly insufficient to justify a no-knock entry.

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[5] There is no crime of assault in Wisconsin.

The statement that Ms. Eason was arrested three times for obstructing and nine times for larceny adds nothing. The latter is a property crime, and obstructing may involve nothing more than giving false information to police. ***See*** Wis. Stat. § 946.41(2)(a). Information that Ms. Eason has been arrested a number of times has little relevance in assessing whether the danger in knocking and announcing is substantial, unless there was information showing that those arrests involved offenses where weapons were used or violence toward police. Of that, there is no indication.

The state's effort to analogize to sentencing is misplaced. At sentencing a court assesses the defendant's character generally; here, the inquiry is limited to whether there is reasonable suspicion that knocking and announcing would be dangerous. The two are not synonymous. After all, information that an individual has a long record of non-violent offenses is an indication that the individual would *not* use violence toward police executing a search warrant, even though her "character" is that of a career criminal. Similarly, here, Ms. Eason's arrest record contains no information that she has a history of possessing, much less using, a weapon or acting violently toward police.

The case law makes clear that the sketchy information in this warrant application was insufficient to trigger the danger exception to the rule of announcement. In ***United States v. Dupras***, 980 F. Supp. 344, 345-46 (D. Mont. 1997), the warrant application listed the occupants' criminal histories as including arrests for drug offenses, felony assault and resisting arrest but did not specify the disposition or underlying facts. Noting that no weapons were seen in the apartment during police surveillance, the court held that the search warrant erroneously authorized a no-knock entry and ordered the evidence suppressed. ***Id.*** at 349. The court said the prior arrests did not present the element of danger needed to justify a no-knock entry. ***Id.*** at 348-49. Indeed, evidence at the suppression

hearing showed that the felony assault was a domestic dispute between the suspect and his wife. ***Id.*** at 346. ***Dupras*** illustrates why the mere reference to "assaults," without any underlying facts, is unenlightening. ***See also Commonwealth v. McDonel***, 601 A.2d 302, 305-06 (Pa. Super. 1991)(no reasonable suspicion of danger in executing search warrant for drugs where police knew that two years earlier defendant pled guilty to possession of marijuana, cocaine and unlicensed firearm); ***State v. Arce***, 730 P.2d 1260, 1263 (Or. Ct. App. 1987)(occupant's history of assault and resisting arrest did not create exigent circumstances justifying noncompliance with constitutional knock and announce requirement).

Without knowing what occurred and when it occurred, a warrant-issuing magistrate cannot assume a prior arrest involved weapons or violent conduct toward police. A blanket exception for felony drug investigations is incompatible with the Fourth Amendment. Allowing a no-knock entry based on arrest records that neither link the suspect to a weapon nor reflect prior violent behavior toward police is no better. This court should affirm the lower courts' determination that the warrant application failed to provide reasonable suspicion that knocking and announcing would be dangerous.

II. THE "CAUSAL RELATIONSHIP" EXCEPTION TO THE EXCLUSIONARY RULE ADVOCATED BY THE STATE IS CONTRARY TO PRECEDENT OF THIS COURT AND THE UNITED STATES SUPREME COURT AND WOULD EVISCERATE THE CONSTITUTIONALLY BASED RULE OF ANNOUNCEMENT.

The state asserts that if the no-knock entry into the Eason apartment was unreasonable and violated the state and federal constitutions, the evidence need not be

suppressed because there was no "causal relationship" between the illegal entry and search. The state's proposal must be rejected because it flies in the face of long-standing precedent from this court and the United States Supreme Court. Its effect would be to eviscerate the rule of announcement and swiftly eliminate all judicial review of no-knock entries.

Allowing the state to use evidence that was obtained in an unlawful no-knock search is contrary to this court's interpretations of art. I, § 11. The court has long held that "the only method" of protecting the constitutional guarantee against unreasonable searches and seizures is by ordering the illegally seized evidence suppressed. ***Glodowski v. State***, 196 Wis. 265, 268, 220 N.W. 227 (1928). Accordingly, "courts should at all times jealously guard and protect a citizen in the full enjoyment of his constitutional rights, by suppressing evidence seized in violation of his rights ...." ***State ex rel. Meyer v. Keeler***, 205 Wis. 175, 236 N.W. 561 (1931). Contrary to the state's claim, the exclusionary rule applies not only when a warrant is issued without probable cause but also when the "manner" of executing the warrant is unreasonable. ***State v. Drew***, 217 Wis. 216, 221, 257 N.W. 681 (1935); ***see also Alston v. State***, 30 Wis. 2d 88, 94-5, 140 N.W.2d 186 (1965)("If the search is not based upon probable cause or is otherwise unreasonable the penalty is exclusion of the evidence so obtained."); ***Jokosh v. State***, 181 Wis. 160, 162, 193 N.W. 976 (1923)("A search must be lawful in its entirety."). Consequently, when police have executed warrants in violation of the constitutionally based rule of announcement, this court and the court of appeals have ordered the evidence suppressed. ***Cleveland***, 118 Wis. 2d at 619; ***State v. Stevens***, 213 Wis. 2d 324, 333, 570

N.W.2d 593 (Ct. App. 1997).[6] These cases are incompatible with the state's proposed exception to the exclusionary rule.

The state's contention fares no better under the federal constitution. The United States Supreme Court has never endorsed, even implicitly, the exception proposed here. The last time the Supreme Court expressly addressed the question of the appropriate remedy for a knock and announce violation it held that, if the violation is not excused by exigent circumstances, the illegally seized evidence must be excluded. ***Miller***, 357 U.S. at 309; ***Sabbath***, 391 U.S. at 586. The court has never overruled those holdings. In fact, in ***Wilson*** and ***Ramirez*** the court refused the opportunity to do so. ***Wilson***, 514 U.S. at 937 n.4; ***Ramirez***, 118 S. Ct. at 997 n.3. To suggest ***Ramirez*** "recognized" the causal relationship "test" proposed by the state is at best misleading (state's brief at 20). A more accurate reading of ***Wilson***, ***Richards*** and ***Ramirez*** is that they cannot be squared with the state's proposal that would render unenforceable the constitutionally based rule of announcement.

The essence of the state's argument is that the search is wholly detached from the execution of the warrant. The state's attempt to sever the entry from the search is inconsistent with the holding in ***Wilson*** that the entry itself is an element of the reasonableness of the search. ***Wilson***, 514 U.S. at 934. The state's exception is built upon an artificial dichotomy. As ***Wilson*** indicates, the entry is an integral part of the ensuing search and

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[6] ***Ward***, 231 Wis. 2d at ¶¶ 45 & 62, stands in isolation. There, the court held that "in a narrow band of cases" suppression is inappropriate where police were acting under the blanket exception recognized by this court before it was thrown out in ***Richards***. The exception advocated here is not narrowly tailored but would apply to any no-knock execution of a search warrant.

seizure and a violation of the rule of announcement would necessarily taint the seizure.

Like other Fourth Amendment violations, the remedy for violations of the rule of announcement is suppression of evidence obtained in the search.[7] ***See, e.g., United States v. Bates***, 84 F.3d 790, 795 (6th Cir. 1996); ***United States v. Becker***, 23 F.3d 1537, 1541-42 (9th Cir. 1994); ***United States v. Moore***, 91 F.3d 96, 99 (10th Cir. 1996). To hold otherwise and adopt the state's proposal "would completely emasculate the knock-and-announce rule." ***United States v. Dice***, 200 F.3d 978, 986 (6th Cir. 2000). The state's exception seeks to do indirectly what it cannot do directly, ignore ***Wilson*** and ***Richards***. It stands on no firmer ground than would a refusal to accept the constitutional nature of the knock and announce principle. In effect, it creates a blanket exception to the rule of announcement that dwarfs the one thrown out in ***Richards***. After all, police need never comply with the rule of announcement when executing a search warrant if there is no sanction for unlawful noncompliance.

The state analogizes to the "independent source" doctrine applied in ***Segura v. United States***, 468 U.S. 796, 805 (1984), and the "inevitable discovery" doctrine adopted in ***Nix v. Williams***, 467 U.S. 431, 440-48 (1984). Most federal courts that have considered the question have held that neither doctrine applies to evidence seized after an entry in violation of the rule of announcement. ***Dice***, 200 F.3d at 984-86; ***United States v. Marts***, 986 F.2d 1216, 1220 (8th Cir. 1993); ***United States v. Espinoza***, 105 F. Supp.2d 1015, 1020-21 (E.D. Wis. 2000); ***United States v. Shugart***, 889 F. Supp. 963, 975-77 (E.D. Tex. 1995), ***aff'd*** 117 F.3d 838 (5th Cir. 1997),

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[7] The exclusionary rule reaches not only evidence obtained as a direct result of the unconstitutional search but also evidence that is the product or indirect result of an illegal search. ***Wong Sun v. United States***, 371 U.S. 471, 488 (1963).

cert. denied, 522 U.S. 976 (1997). Most states agree. ***Mazepink v. State***, 987 S.W.2d 648, 656-57 (Ark. 1999); ***State v. Martinez***, 579 N.W.2d 144, 148-49 (Minn. Ct. App. 1998); ***Commonwealth v. Rudisill***, 622 A.2d 397, 400 n.7 (Pa. 1993); ***Commonwealth v. Gomes***, 556 N.E.2d 100, 103 (Mass. 1990). These courts recognize that the independent source and inevitable discovery doctrines are inapposite to an illegal no-knock entry because they require a search or investigation that is wholly independent of the illegality. Here, there was one search, one investigation.

The independent source doctrine allows admission of evidence that has been discovered by means "wholly independent of any constitutional violation." ***Nix***, 467 U.S. at 443. It applies where an illegal search takes place at some point during a criminal investigation, but where a proper, independent search led to the evidence seized. In ***Segura***, 468 U.S. at 813-14, the court held that because a second search pursuant to a warrant was undertaken independent of an initial illegal search, evidence resulting from the latter, legal search was admissible. The admissible evidence in ***Segura*** arose from a search that had both a valid warrant and a legal entry. In this case, there was one entry, and it was illegal.[8]

The inevitable discovery doctrine is equally inapplicable. That doctrine requires the state to proffer clear evidence of an independent, untainted investigation that inevitably would have uncovered the same evidence as that discovered through the illegal search. ***Nix***, 467 U.S. at 444. The state cannot meet that burden here, nor

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[8] ***United States v. Dennis Jones***, 149 F.3d 715 (7th Cir. 1998), cited by the state, is analytically similar to ***Segura*** but unlike this case. There, two police teams approached Jones' residence to search for drugs. The "front-door team" violated the announcement rule but only *after* the "back-door team" had Jones in custody on the back lawn. Consequently, the front-door team's entry played no role in the back-door team's legal seizure of Jones. ***Id.*** at 717.

in most searches in which the no-knock entry was unlawful. The warrant application makes clear that there was one investigation into suspected drug activity at the Eason apartment and that investigation culminated in the illegal entry. ***See Martinez***, 579 N.W.2d at 148 (inevitable discovery doctrine would swallow up protection against unreasonable no-knock entry if evidence seized after the entry was admissible simply because police had a warrant).

The federal and state courts cited above have seen through the government's claim, also made here, that its exception does not mean that the exclusionary rule would never apply after a no-knock entry. Indeed, the state's strained effort to come up with a single example where it "could have been proper to suppress" evidence seized following a no-knock entry belies its claim (state's brief at 23). And it is ironic given the state's concerns about officer safety, as expressed earlier in its brief, that its lone example of a circumstance where suppression might be appropriate involves a resident who grabs a gun, previously hidden from view, to defend himself against the entering police. The reality is that the exception proposed here, which has never been endorsed by this court or the United States Supreme Court, would "in one swift move gut the constitution's regulation of how officers execute such warrants." ***Dice***, 200 F.3d at 986.[9] That is why the court of appeals rejected it. ***State v. Eason***, 2000 WI App 73, ¶ 9, 234 Wis. 2d 396, 402, 610 N.W.2d 208 (exception would "nullify what we considered to be an important deterrent against

[9]As noted by the state, Michigan has adopted the exception advanced here, but that state, unlike Wisconsin, has a statute that imposes a criminal penalty on "[a]ny person who in executing a search warrant, wilfully exceeds his authority or exercises it with unnecessary severity ...." M.S.A. § 28.1259(7). In adopting a causal relationship exception, the Michigan Supreme Court noted that this statute provides disincentives for police misconduct, other than exclusion of evidence. ***People v. Stevens***, 597 N.W.2d 53, 61 (1999).

unconstitutional conduct by police"), ***citing Stevens***, 213 Wis. 2d at 335-37.

The state's proposal would effectively eliminate judicial scrutiny of the reasonableness of no-knock entries. This court has recognized that the "'scheme of the Fourth Amendment becomes meaningful only when it is assured that ... the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search ... in light of the particular circumstances.'" ***Meyer***, 216 Wis. 2d at 751, ***quoting Terry v. Ohio***, 392 U.S. 1, 21 (1968). This point is proven by the actions of the two courts that, as cited by the state, have adopted the exception proposed here. In less than two years after adopting a causal relationship exception, the Seventh Circuit Court of Appeals and the Michigan Supreme Court each held in a subsequent case that it need not address the reasonableness of the no-knock entry because even if it was illegal, the evidence would not be suppressed. ***United States v. Kip Jones***, 214 F.3d 836, 838 (7th Cir. 2000); ***People v. Vasquez***, 602 N.W.2d 376, 378 (1999). Consequently, under the state's proposal, the police, not the courts, would determine the reasonableness of a police entry into a home. Such judicial abdication is incompatible with the Supreme Court's recent decisions recognizing the rule of announcement's place in the Fourth Amendment and rejecting a blanket rule that "dispens[ed] with case-by-case evaluation of the manner in which a search was executed." ***Richards***, 520 U.S. at 392.

This court must reject the state's proposed "causal relationship" exception because it is incompatible with the state and federal constitutions. The lower courts correctly ordered the evidence suppressed.

III. THE GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE IS INCOMPATIBLE WITH THE RIGHTS GUARANTEED BY THE WISCONSIN CONSTITUITON AND IS PREMISED ON A FLAWED AND WIDELY CRITICIZED COST-BENEFIT ANALYSIS.

Nearly 80 years ago, this court held that art. I, § 11 of the Wisconsin Constitution is a "pledge of faith of the state government" that the people of this state will be secure from unreasonable searches and seizures. ***Hoyer v. State***, 180 Wis. 407, 417, 193 N.W. 89 (1923). The court further held that the pledge is violated if the state is allowed to use in a criminal prosecution evidence that was illegally seized. ***Id.*** With that, the exclusionary rule was born in Wisconsin.

The state is asking the court to abrogate that pledge and adopt a good-faith exception to the exclusionary rule based upon ***United States v. Leon***, 468 U.S. 897 (1984). In ***Leon***, the Supreme Court held that evidence seized pursuant to a warrant issued without probable cause is nevertheless admissible as long as the police officer acted in objectively reasonable reliance on the warrant. Asserting that here the police acted in objective reasonable reliance on a warrant authorizing a no-knock entry, the state seeks adoption of a good faith exception to the Wisconsin exclusionary rule.[10]

As shown below, this court would have to overrule ***Hoyer*** and its progeny to adopt the good-faith exception. Doing so would disrupt the rules and procedures under which the legal system has operated in this state for nearly 80 years. The court would be rejecting long-standing

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[10] As the state recognizes, in ***Ward***, this court did not adopt the ***Leon*** good-faith exception. The state is asking the court to do so now. Although this case involves a no-knock warrant, the exception the state seeks would not be limited to warrants erroneously authorizing no-knock entries. Consequently, Mr. Eason will address the good-faith exception in its broader context.

precedent based on a decision that has been widely criticized and is premised on a flawed cost-benefit analysis. Moreover, it would be adopting the exception in a case where the warrant application was so deficient in showing a need to dispense with the rule of announcement that reliance on the warrant was not objectively reasonable.

Mr. Eason is merely asking the court to honor the pledge embodied in art. I, § 11.

A. The exclusionary rule is a personal right guaranteed by the Wisconsin Constitution.

The Wisconsin Constitution may provide greater protection to the people of this state than is required by the United States Constitution. ***State v. Hansford***, 219 Wis. 2d 226, 242, 580 N.W.2d 171 (1998). The exclusionary rule is such an example. Forty years before the United States Supreme Court required state courts to employ the exclusionary rule, ***Mapp v. Ohio***, 367 U.S. 643, 654-56 (1961), this court in ***Hoyer*** adopted an exclusionary rule as a necessary corollary of art. I, § 11, which protects an individual from unreasonable search and seizure, and art. I, § 8, which protects an individual from self-incrimination. The court wrote:

> Sec. 11, art. I, Wis. Const., *supra*, is a pledge of the faith of the state government that the people of the state, all alike (with no express or possible mental reservation that it is for the good and innocent only), shall be *secure* in their persons, houses, papers, and effects against unreasonable search and seizure. This security has vanished and the pledge is violated by the state that guarantees it when officers of the state, acting under color of state-given authority, search and seize unlawfully. The pledge of this provision and that of sec. 8 are

> each violated when use is made of such evidence in one of its own courts by other of its officers.

Id. at 417 (emphasis in original).

In recent years, this court has differed on the meaning of ***Hoyer***. In ***State v. Brady***, 130 Wis. 2d 443, 453, 388 N.W.2d 151 (1986), the court said that ***Hoyer*** adopted an exclusionary rule "based upon the Wisconsin Constitution," and adoption of the good-faith exception would necessitate overruling ***Hoyer***. Two years later, Justice Steinmetz, writing for a divided court in ***State v. Tompkins***, 144 Wis. 2d 116, 133-35, 423 N.W.2d 823 (1988), said the exclusionary rule was a mere "judicial remedy" and that ***Hoyer*** was based exclusively on federal cases. Last term, this court declined to re-examine the language in ***Tompkins***. ***Ward***, 2000 WI at ¶ 58. It must do so now. As noted by Justice Prosser, Justice Steinmetz's analysis was dictum and was "not correct in asserting" that ***Hoyer*** was based exclusively on federal cases. ***State v. Orta***, 2000 WI 4, ¶ 13, 231 Wis. 2d 782, 604 N.W.2d 543 (Prosser, J., concurring). In addition, his analysis failed to take into account the decisions of this court after ***Hoyer*** that make clear the exclusionary rule is a personal right guaranteed by the state constitution. The distinction between a judicial remedy and personal right is critical because it was by construing the exclusionary rule as nothing more than a judicial remedy that the Supreme Court in ***Leon*** justified creating the good-faith exception. ***Leon***, 468 U.S. at 907.[11]

This state's constitutional conventions in 1846 and 1847-48 contained little debate about the right against unreasonable search and seizure. The delegates took it

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[11] Justice Brennan rejected this narrow conception of the exclusionary rule as a "crabbed reading of the Fourth Amendment [that] casts aside the teaching of those Justices who first formulated the exclusionary rule, and rests ultimately on an impoverished understanding of judicial responsibility in our constitutional scheme." ***Leon***, 468 U.S. at 936 (Brennan, J., dissenting).

for granted that civil liberties would be preserved, including those specified in art. I, § 11. Brown, ***The Making of the Wisconsin Constitution***, 1949 Wis. L. Rev. 648, 655. The first serious attack on civil liberties occurred in the 1920s during Prohibition. This court commented in 1928 that "[m]ore cases involving the validity of search warrants have come to this court in the last half dozen years than during the entire history of the state." ***Glodowski***, 196 Wis. at 275. It was in the era of Prohibition, as the efforts of law enforcement clashed with the personal rights guaranteed by the Wisconsin Constitution, that this court adopted the exclusionary rule. ***Hoyer*** and its progeny make clear that the exclusionary rule, rather than a mere judicial remedy, is a personal right mandated by art. I, § 11.

In ***Hoyer***, this court recognized that it is "pledged to support and uphold" the constitutional guarantees, "be the consequences what they may." 180 Wis. at 418. In three post-***Hoyer***, Prohibition-era decisions, the court even more directly stated that the exclusionary rule is a constitutional mandate that can only be changed by constitutional amendment. Writing about art. I, § 11 , the court in ***Glodowski*** said:

> Until the people shall see fit to change this constitutional mandate, each department of government must give full force and effect to this command of the people, even though it may seem at times to render more difficult the apprehension and punishment of those who violate the laws of the state.

Glodowski, 196 Wis. at 268. In a case where the court suppressed evidence because the search warrant lacked probable cause, the court said that allowing the evidence to be used against the defendant "would be in substance to deprive him of his constitutional right to be secure against unreasonable searches and seizures." ***Jaeger***, 196 Wis. at 101; ***see also Jokosh***, 181 Wis. at 163 (duty of

court to enforce the constitution in its entirety). Then in 1956, the court re-affirmed those decisions:

> We consider that if the time has come when convictions are more important than the preservation of the guarantees of secs. 8 and 11, art. I of the state constitution, -- whose counterparts are found in the Bill of Rights, United States constitution, -- these sections should be amended by popular vote as the constitution prescribes, and not by a relaxation of rules by new judicial interpretation.

State v. Kroening, 274 Wis. 266, 275-76, 79 N.W.2d 810 (1956).

These cases make clear that this court has interpreted art. I, § 11 as a guarantee to the people of this state that illegally seized evidence will not be introduced against them. Adoption of the good-faith exception would require overruling, at a minimum, ***Hoyer***, ***Glodowski***, ***Jaeger***, ***Jokosh*** and ***Kroening***. The court should not depart from long-standing precedent without "strong justification," particularly when construing the constitution. ***State v. Stevens***, 181 Wis. 2d 410, 441, 511 N.W.2d 591 (1994)(Abrahamson, J., concurring). There is no such justification here.

Justice Bablitch has commented upon the "fierce tension" between the desire to aid the government in its efforts to enforce the drug laws and to protect the citizens' right of privacy in their homes. ***Tompkins***, 144 Wis. 2d at 158 (Bablitch, J., dissenting). That clash is not unlike what the court faced during Prohibition. Then, the government complained that limits on its ability to search

meant the Prohibition laws could not be enforced.[12] ***Jokosh***, 181 Wis. at 163. This was the court's response:

> This may be true in part or it may be true in whole. The answer is that an article of the constitution having its origin in the spirit if not in the letter of the Magna Carta prevents it, and that it is the duty of the court to sustain and enforce the constitution in its entirety, and not to permit what may seem to be presently a desirable mode of procedure to annul such fundamental portions of our organic law as the freedom from unlawful searches.

Id. Since the 1920s, art. I, § 11 has not changed, and neither have the duties of this court. The court should not retreat from its long-standing precedent.

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[12] In a law review article published in 1929, the Dane County district attorney described murders, violent assaults and "general chaos" associated with bootlegging activities of Italian immigrants in Madison's "Greenbush" neighborhood. Roberts, ***Does the Search and Seizure Clause Hinder the Proper Administration of the Criminal Justice?***, 5 Wis. L. Rev. 195, 196 (1928-30). Complaining that ***Glodowski*** and other search and seizure decisions tied the hands of law enforcement, the author wrote:

> We must expect if the past is to teach us anything that, as the complexity of our existence increases, we must yield more and more of our personal rights and liberties to regulation. The prosecutor sometimes feels that it was not the intention that the search and seizure clause was to be so unbending as to fail to properly meet present day conditions.

Id. at 207-08. This court did not yield then, and it should not do so now. As Justice Brandeis warned, "[e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent." ***Olmstead v. United States***, 277 U.S. 438, 479 (1928)(Brandeis, J., dissenting).

B. This court should not overrule long-standing precedent based on *Leon*, which has been widely criticized.

The state cites no justification, much less "strong justification," for significantly altering at this late date the exclusionary rule that has been firmly grounded in the state constitution for nearly 80 years.

The virtually identical language of art. I, § 11 and the Fourth Amendment does not require lockstep conformance. Even in those cases in which this court has followed federal search and seizure law, it has consistently asserted that it will provide greater protection under the Wisconsin Constitution if the United States Supreme Court interprets the Fourth Amendment in a way that undermines the protections of art. I, § 11. ***State v. Fry***, 131 Wis. 2d 153, 174, 388 N.W.2d 565 (1986). Indeed, the most recent state to reject the good-faith exception as incompatible with its constitution – Iowa – has a constitutional provision that mirrors the Fourth Amendment and a history of construing its provision to conform with Supreme Court interpretations of the Fourth Amendment. ***State v. Cline***, 617 N.W.2d 277, 284 (Iowa 2000).

The state's complaint that rejection of the good-faith exception would create confusion due to differing state and federal standards ignores the fact that in the 16 years since ***Leon*** was decided the courts of this state have employed a substantially broader exclusionary rule than the federal courts. The state cannot point to any particular problems this has created, and none would be expected. After all, the exclusionary rule is not a standard interpreted and applied by police officers. ***Compare, e.g.***, ***State v. Rodgers***, 119 Wis. 2d 102, 349 N.W.2d 453 (1984)(standard for determining if there is consent to search employed by police and conformed to federal law). It is interpreted and applied by judges, prosecutors and defense attorneys. For 16 years, judges and lawyers have

resolved suppression issues despite a dichotomy between state and federal law concerning a good-faith exception. Rejecting the good-faith exception would not create uncertainty but maintain the *status quo*.

The court should not overrule its long-standing precedent to conform to a decision that has been widely criticized by state courts and commentators. ***See, e.g.***, Wasserstrom and Mertens, ***The Exclusionary Rule on the Scaffold: But was it a Fair Trial?***, 22 Am. Crim. L. Rev. 85 (1984). At least 12 states have rejected the good faith exception as incompatible with their state constitutions.[13] Another two states have rejected the good-faith exception on state statutory grounds.[14] A far fewer number of states have followed ***Leon***.[15] Most of the courts that have rejected ***Leon*** have taken issue with its cost-benefit analysis.

C. The good-faith exception is premised on a flawed cost-benefit analysis.

The cost-benefit analysis used in ***Leon*** to justify adoption of the good-faith exception unfairly minimizes the benefits of the exclusionary rule and exaggerates its costs. In essence, the Supreme Court balanced the fate of the exclusionary rule with its fist on the scale.

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[13] ***Blank v. State***, 3 P.3d 359 (Alaska Ct. App. 2000); ***State v. Marsala***, 579 A.2d 58 (Conn. 1990); ***State v. Guzman***, 842 P.2d 660 (Idaho 1992); ***State v. Cline***, 617 N.W.2d 277 (Iowa 2000); ***State v. Canelo***, 653 A.2d 1097 (N.H. 1995); ***State v. Novembrino***, 519 A.2d 820 (N.J. 1987); ***State v. Gutierrez***, 863 P.2d 1052 (N.M. 1993); ***People v. Bigelow***, 488 N.E.2d 451 (N.Y. 1985); ***State v. Carter***, 370 S.E.2d 553 (N.C. 1988); ***Commonwealth v. Edmunds***, 586 A.2d 887 (Pa. 1991); ***State v. Oakes***, 598 A.2d 119 (Vt. 1991); ***State v. Crawley***, 808 P.2d 773 (Wash. App. 1991).

[14] ***Gary v. State***, 422 S.E.2d 426 (Ga. 1992); ***Imo v. State***, 826 S.W.2d 714 (Tex. Ct. App. 1992).

[15] ***See Crayton v. Commonwealth***, 846 S.W.2d 684 (Ky. 1992); ***State v. Brown***, 708 S.W.2d 140 (Mo. 1986); ***State v. Wilmoth***, 490 N.E.2d 1236 (Ohio 1986).

1. The benefits of the exclusionary rule.

Leon's assessment is marred by its overly narrow interpretation of the exclusionary rule's purpose, a reading inconsistent with this court's interpretation of art. I, § 11. According to ***Leon***, the sole purpose of the exclusionary rule is to deter police misconduct rather than to "punish the errors of judges and magistrates." ***Leon***, 468 U.S. at 917. The court's artificial severance of the police and judiciary is incompatible with this court's construction of the exclusionary rule under the Wisconsin Constitution. In ***Hoyer***, 180 Wis. at 417, the court held that art. I, § 11 is violated "when use is made of such evidence in one of its own courts by other of its officers." The court recognized that the prosecutor who offers illegally-seized evidence and the court that admits that evidence become parties to the illegalities to the same extent as the police officer who initially seized the evidence. This view of the exclusionary rule, shared by other states, is incompatible with ***Leon***. ***See***, **e.g.**, ***Cline***, 617 N.W.2d at 289; ***Guzman***, 842 P.2d at 672.

Research data shows that the exclusionary rule is necessary to regulate the conduct of more than just the police. A study published by the National Center for State Courts found that magistrate review of search warrant applications is at best cursory. R. Van Duizend, L.P. Sutton & C. Carter, ***The Search Warrant Process*** (1985). The average length of magistrate review was less than three minutes. ***Id.*** at 26. The information available to the magistrate frequently had limited value because applications were often based on unsworn hearsay of anonymous informants and frequently contained boilerplate language. ***Id.*** at 52, 105. Moreover, only 8% of the proceedings observed in the study resulted in denial of the warrant application. ***Id.*** at 27. The significance of this data is not to show that magistrates purposely subvert the constitution. Rather, it demonstrates that the decision of a magistrate to issue a search warrant and to authorize

a no-knock entry should not be shielded from meaningful judicial review. Yet that is the effect of the good-faith exception. The good-faith exception tells magistrates that they need take even less care in reviewing warrant applications because their mistakes will have virtually no consequence. ***Leon***, 468 U.S. at 956 (Brennan, J., dissenting).

The good-faith exception also encourages sloppy police work. It encourages officers to expend less effort establishing probable cause and more effort in locating a judge who is less demanding than others in his or her review of warrant applications. ***Marsala***, 579 A.2d at 67. Courts have cited concern about dilution of the probable cause standard as a reason for rejecting the good-faith exception. ***Guzman***, 842 P.2d at 676-77. The same concerns arise with the reasonable suspicion standard for dispensing with the rule of announcement.

Several states have also concluded that the exception would encourage police departments to abandon warrant application procedures and training programs that were instituted to ensure compliance with constitutional mandates. ***Novembrino***, 519 A.2d at 852; ***Carter***, 370 S.E.2d at 560. The types of police department practices that may be jeopardized by the good-faith exception are described in a study of the narcotics unit of the Chicago Police Department. Orfield, ***The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers***, 54 U. Chi. L. Rev. 1016 (1987). The study found that the exclusionary rule prompted the police department and prosecutor's office to forge a close working relationship under which attorneys reviewed each warrant application to ensure that it was based on probable cause and informed police officers of appellate rulings on suppression motions. ***Id.*** at 1027, 1035.

The data shows that indeed the exclusionary rule works in the manner described by this court nearly 80

years ago. It is an incentive for police, prosecutors and courts to abide by art. I, § 11. There is no reason to undermine that incentive by adopting the good-faith exception.

2. The "costs" of the exclusionary rule.

At the same time that ***Leon*** brushed aside the benefits of the exclusionary rule, it exaggerated the "costs" of the rule far beyond what has been found by empirical research. In a sort of judicial double-speak, the court decried the "substantial social costs" exacted by the exclusionary rule and then cited as support a study which concluded that the costs of the exclusionary rule, in terms of dropped prosecutions and lost convictions, are quite minimal. ***Leon***, 468 U.S. at 908 n.6. The study found the rule results in non-prosecution or non-conviction of between 0.6% and 2.35% of persons arrested for felonies. Other studies have produced similar findings.[16]

Other state courts have recognized that the costs asserted by ***Leon*** are overblown and do not justify adoption of the good-faith exception. ***Cline***, 617 N.W.2d at 292; ***Guzman***, 842 P.2d at 675. The Connecticut Supreme Court recognized that ***Leon***'s assessment of costs is faulty because it considered the impact of the exclusionary rule in all cases rather than measuring the effect of the rule in those cases in which evidence was suppressed despite the objectively reasonable behavior of

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[16] A study that analyzed the impact of motions to suppress evidence in nine middle-sized jurisdictions found that less than 0.69% of the cases were lost because of the exclusionary rule. Nardulli, ***The Societal Costs of the Exclusionary Rule: An Empirical Assessment***, 1983 Am. B. Found. Res. J. 585, 606-07. The same researcher studied the court system in Chicago in 1987 and concluded that only 1.77% of all cases resulted in no conviction because of evidence suppressed under the exclusionary rule. Nardulli, ***The Societal Costs of the Exclusionary Rule Revisited***, 1987 Univ. Ill. L. Rev. 223, 234.

the police officers in relying on a warrant. ***Marsala***, 579 A.2d at 64-65. A proper weighing reveals that the costs of the exclusionary rule which would be alleviated by adoption of the good-faith exception are insubstantial. W. LaFave, ***Search and Seizure***, § 1.3(c) (1996).

Perhaps the most serious flaw in ***Leon***'s assessment is that it failed to recognize that the costs arise from the Fourth Amendment. As this court has previously made clear, the "cost" is a product of the right against unreasonable searches and seizures guaranteed by art. I, § 11. ***Jokosh***, 181 Wis. at 163. It is a price the framers anticipated and were willing to pay to ensure the sanctity of the home.

The good-faith exception comes with its own costs, in addition to its serious erosion of the right against unreasonable searches and seizures. This court has complained about the complexity and confusion that the Supreme Court has created in the area of search and seizure. ***Conrad v. State***, 63 Wis. 2d 616, 634, 218 N.W.2d 252 (1974). Adoption of the ***Leon*** standard would only exacerbate the problem. Although ***Leon*** held that evidence seized under an invalid search warrant is admissible if the police officer relied on that warrant with objective good faith, the court failed to define "objective good faith" with any precision. It also created four exceptions to the exception,[17] leaving the lower courts to determine if those exceptions are exclusive or how they are to be applied. As a result, it is not at all clear which conditions make the good-faith exception applicable. ***Brady***, 130 Wis. 2d at 456 (Abrahamson, J., concurring).

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[17] The four exceptions are: (1) the police officer's affidavit contains knowingly or recklessly made falsehoods; (2) the issuing magistrate wholly abandons his or her judicial role; (3) the warrant is based on an affidavit so lacking in indicia of probable cause that reliance on it is entirely unreasonable; and (4) the warrant is so facially deficient, *i.e.*, in failing to particularize the place to be searched or the things to be seized, that the officers could not reasonably believe it to be valid. ***Leon***, 468 U.S. at 924.

Moreover, if this court adopts the good-faith exception, it can expect to be asked to apply it in circumstances well beyond those of ***Leon***. In fact, the government has sought to apply the good-faith exception to an illegal no-knock entry where the warrant did *not* authorize a no-knock entry. ***Shugart***, 889 F. Supp. at 975.

The flawed reasoning of ***Leon*** is poor justification for abandoning long-standing precedent. The court should hold true to its pledge to protect the people of this state from unreasonable searches and seizures as guaranteed by art. I, § 11. It should reject the good-faith exception as incompatible with the Wisconsin Constitution.

D. The good-faith exception does not apply here because reliance on the no-knock warrant was not objectively reasonable.

This case is a poor vehicle for the court to consider adopting the good-faith exception because "objective good faith" was not present here. In ***Leon***, the court said that the good-faith exception does not apply if the search warrant was based on affidavits "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." ***Leon***, 468 U.S. at 923; ***see, e.g.***, ***United States v. Herron***, 215 F.3d 812, 814-15 (8th Cir. 2000)(good faith exception not apply because search warrant was so lacking in probable cause that no reasonable officer would rely on it). Here, the affidavit for the warrant to search the Eason apartment was so lacking in indicia of reasonable suspicion that knocking and announcing would be dangerous that the police officers could not reasonably rely on the no-knock warrant.

As argued in Section I of this brief, the warrant application was plainly inadequate to support a no-knock entry. The affidavit contained no information linking a gun or other weapon to the apartment or its occupants.

Nor did it indicate that any occupant had ever used or threatened force against the police. The case law requires much more than was contained in this affidavit. Moreover, the police sought and obtained the warrant a full year *after* ***Richards*** rejected the blanket exception for drug investigations and demanded case-by-case evaluation of the particular circumstances in order to determine if there was reasonable suspicion that dispensing with the rule of announcement would be dangerous.

Even if this court were to adopt the good-faith exception, it should not apply it here. The court should affirm the lower courts' rulings suppressing evidence obtained in the illegal no-knock search of the Eason apartment.

CONCLUSION

For the reasons set forth above, Rayshun Eason requests that the court affirm the decision of the court of appeals.

Dated this 21st day of November, 2000.

Respectfully submitted,

SUZANNE HAGOPIAN
Assistant State Public Defender
State Bar No. 1000179

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5177

Attorney for Defendant-Respondent

CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 10,548 words.

Dated this 21st day of November, 2000.

Signed:

SUZANNE HAGOPIAN
Assistant State Public Defender
State Bar No. 1000179

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5177

Attorney for Defendant-Respondent

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 98-2595-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

RAYSHUN D. EASON,

Defendant-Respondent.

REVIEW OF DECISION OF DISTRICT IV OF COURT OF APPEALS THAT AFFIRMED THE TRIAL COURT'S ORDER SUPPRESSING EVIDENCE THAT WAS ENTERED IN THE CIRCUIT COURT FOR ROCK COUNTY, THE HONORABLE EDWIN C. DAHLBERG, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT-PETITIONER

JAMES E. DOYLE
Attorney General

STEPHEN W. KLEINMAIER
Assistant Attorney General
State Bar No. 1014422

Attorneys for Plaintiff-Appellant-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8908

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IN SUPREME COURT

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ARGUMENT

I. THE INFORMATION IN THE SEARCH WARRANT AFFIDAVIT PROVIDED A REASONABLE SUSPICION THAT ANNOUNCEMENT BEFORE ENTERING WOULD BE DANGEROUS.

The defendant argues that the search warrant affidavit failed to provide reasonable suspicion that an announced entry would be dangerous because the affidavit

failed to show that the suspects had previously used, threatened to use or at least had possessed a dangerous weapon. Brief of Defendant-Respondent at 9.

To support his claim that the danger must be substantial and typically involve the use of firearms, the defendant at pages 9-10 of his brief cites the comment in *Richards v. Wisconsin*, 520 U.S. 385, 393 (1997), that "while drug investigation frequently does pose special risks to officer safety and the preservation of evidence, not every drug investigation will pose these risks to a substantial degree."

When read in the context of the entire paragraph, the Supreme Court's reference to substantial risk means the substantial likelihood that the officers will face danger. The Court did not use the term "substantial risk" to refer to the degree of danger.

As argued at pages 9 to 11 of its brief-in-chief, the state contends that the police can make the no-knock entry if they have a reasonable suspicion that announcement prior to entry will result in bodily harm to them or someone within the residence. Additional support for the state's position is found in *Commonwealth v. McKeever*, 323 A.2d 44, 45 (Pa. Super. Ct. 1974), where the court found that the unannounced entry was valid because the officer heard noise coming from the apartment that sounded like someone was being injured and in need of help. The entry was valid even though the police had no reason to believe that someone inside was being injured to a degree greater than bodily harm.

Police may make an unannounced entry when they believe that they or someone within the residence is in peril of bodily harm. *See Miller v. United States*, 357 U.S. 301, 309 (1958), and *United States v Singer*, 727 F. Supp. 1281, 1283 (E.D. Wis. 1990), *rev'd on other grounds*, 943 F.2d 758 (7th Cir. 1991). The cases do not require the degree of bodily harm to be greater when the officers are in peril rather than a person within the residence. Just as the police should not need reason to believe that the

person inside is in peril of deadly harm, the police should not need reason to believe they face deadly harm in order to make the unannounced entry.

The defendant argues that the information in the affidavit could not provide reasonable suspicion because the information was stale and vague. Brief of Defendant-Respondent at 12-16.

The information was not stale as indicated by the concurring opinion of Justice Prosser in *State v. Orta*, 2000 WI 4, 231 Wis. 2d 782, 604 N.W.2d 543. In concluding that the affidavit provided reasonable suspicion that an announced entry would be dangerous to the police in the 1997 execution of a search warrant, Justice Prosser cited the suspects' criminal records dating back to 1987 and the fact that the police found a gun when executing a search warrant of the suspects' residence in 1991. *See Orta*, 231 Wis. 2d 782, ¶¶24-31 (Prosser, J., concurring).

The arrest records of Clinton Bentley and Shannon Eason were also not vague since they demonstrated the suspects' character and behavior to help establish the low level of reasonable suspicion that an announced entry would be dangerous.

To support his claim that weapons must be involved to satisfy the reasonable suspicion standard, the defendant cites cases where the police had information that the suspect possessed or had used weapons. Brief of Defendant-Respondent at 11-12.

The fact that in some cases the police had information about weapons does not mean that the police always have to have information about weapons. Although the affidavit in this case contains no particular information connecting Bentley or Shannon Eason to weapons, the affidavit still provided reasonable suspicion that an announced entry would place the officers in peril of bodily harm.

Nevertheless, if the police must face deadly danger to justify the no-knock entry, the affidavit still satisfied the reasonable suspicion standard when the particular facts concerning the arrest records of Bentley and Shannon Eason are considered along with the experience of Officer John Fahrney. Brief of Plaintiff-Appellant-Petitioner at 15-16.

II. THE EVIDENCE SEIZED IN THE EXECUTION OF THE SEARCH WARRANT SHOULD NOT BE SUPPRESSED UNLESS THERE IS A CAUSAL RELATIONSHIP BETWEEN THE OFFICERS' MISCONDUCT AND THE SEIZURE OF THE EVIDENCE.

In its brief-in-chief at page 17, the state contended that, even if the officers violated the United States and Wisconsin Constitutions by failing to comply with the rule of announcement, the evidence should not be suppressed since there is no causal relationship between the officers' misconduct and the seizure of the evidence.

The defendant contends that the state's proposal must be rejected because it is contrary to precedent from this court and the United States Supreme Court and because it would eviscerate the rule of announcement and eliminate all judicial review of no-knock entries.

The defendant incorrectly refers to the causal relationship requirement as an exception to the exclusionary rule.

The causal relationship between the police misconduct and the seizure of the evidence is a prerequisite to applying the exclusionary rule. The relationship is not an exception to the rule. Without the causal relationship, there is no basis for excluding the evidence. *See Segura v. United States*, 468 U.S. 796, 815 (1984) ("[O]ur cases make clear that evidence will not be excluded as 'fruit' unless the illegality is at least the 'but

for' cause of the discovery of the evidence. Suppression is not justified unless the 'challenged evidence is in some sense the product of illegal government activity'"); and *Nix v. Williams*, 467 U.S. 431, 444 (1984) ("It is clear that the cases implementing the exclusionary rule 'begin with the premise that the challenged evidence is *in some sense* the product of illegal governmental activity'").

To apply the exclusionary rule, the causal relationship must be between the illegal government activity and the seizure of the evidence. Therefore, in the case of an illegal no-knock entry, since the illegal government activity is the failure to knock and announce prior to the entry authorized by the search warrant, the causal relationship must be between the officers' failure to knock and announce and the seizure of the evidence.

The defendant argues that the causal relationship requirement to apply the exclusionary rule must be rejected because precedent from this court and the United States Supreme Court apply the exclusionary rule when the rule of announcement has been violated.

In none of the United States Supreme Court or Wisconsin Supreme Court cases cited as precedent by the defendant at pages 17-18 of his brief was the application of the exclusionary rule a contested issue. Where cases suppress evidence without explaining why suppression is the appropriate remedy, they should not be cited as precedent for using the exclusionary rule as a remedy. *See Illinois v. Krull*, 480 U.S. 340, 355 n.12 (1987), where the Court easily distinguished a case that had been cited as authority for a proposition that had not been discussed in the case.

Because the Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, the issue of exclusion is separate from the issue of whether the Fourth Amendment has been violated. *Arizona v. Evans*, 514 U.S. 1, 10, 13 (1995), and *United States v. Leon*, 468 U.S. 897, 906 (1984). The Fourth Amendment does not

command exclusion of everything that would deter police misconduct. *Leon*, 468 U.S. at 910. *See also Evans*, 514 U.S. at 13, noting that current law rejects a reflexive application of the exclusionary rule to evidence secured subsequent to a Fourth Amendment violation.

Therefore, because the application of the exclusionary rule was not an issue in the United States and Wisconsin Supreme Court cases cited by the defendant, and because the courts did not explain why the exclusionary rule was an appropriate remedy in those cases, those decisions are not precedent for using the exclusionary rule to suppress evidence seized in the execution of a valid search warrant subsequent to a police failure to comply with the rule of announcement.

At pages 19-20 of his brief, the defendant cites several cases in which the courts suppressed evidence as a remedy for a violation of the rule of announcement and in which the courts rejected the inevitable discovery rule or the independent source rule as reasons for admitting the evidence. The cases cited by the defendant provide little, if any, guidance for the disposition of this case since none of those cases, including *State v. Stevens*, 213 Wis. 2d 324, 570 N.W.2d 593 (Ct. App. 1997), considered the basic requirement in *United States v. Ramirez*, 523 U.S. 65, 72 n.3 (1998), *Segura* and *Nix* that there must be a causal relationship between the illegal government activity and the seizure of the evidence before the evidence can be suppressed under the exclusionary rule. The exclusionary rule cannot be employed to deter police misconduct unless there is a causal relationship between the misconduct and the seizure of the evidence.

The defendant argues that, if the evidence is not suppressed for a violation of the rule of announcement, there will be no deterrent against unconstitutional police conduct and there will be no judicial scrutiny of the reasonableness of the police conduct. Brief of defendant-Respondent at 21-22.

The defendant is wrong in suggesting there is no consequence to violating the rule of announcement in the absence of excluding the evidence; and he is wrong in claiming that there is nothing to deter police misconduct if the evidence is not excluded. The defendant's arguments are contrary to the conclusion of the Supreme Court in *Segura*, 468 U.S. at 812, where the Court was "unwilling to believe that officers will routinely and purposely violate the law as a matter of course." The Supreme Court also pointed out that, if the officers violate the Fourth Amendment, "they expose themselves to potential civil liability under 42 U.S.C. § 1983." *Segura*, 468 U.S. at 812. *See also Bonner v. Anderson*, 81 F.3d 472 (4th Cir. 1996) (in § 1983 case summary judgment denied because there was a factual dispute whether circumstances justified unannounced entry); *Fontenot v. Cormier*, 56 F.3d 669 (5th Cir. 1995) (plaintiff awarded compensatory and punitive damages for police officers' warrantless entry into her home); *Hartsfield v. Lemacks*, 50 F.3d 950 (11th Cir. 1995) (summary judgment denied for police officer who led other officers to wrong house to execute search warrant); and *Gaston v. Toledo*, 665 N.E.2d 264 (Ohio Ct. App. 1995) (court reverses trial court's directed verdict for some defendants in a § 1983 case where plaintiff claimed the police made an illegal no-knock entry).

The possibility of civil liability serves as a deterrent to police misconduct, as recognized by the Supreme Court in *Nix*, 467 U.S. at 446, where the Court referred to civil liability and department discipline as "[s]ignificant disincentives" to illegal conduct. In addition to civil liability being a deterrent to the individual officer if he or she engages in illegal conduct, the possibility of civil liability is a significant disincentive to the municipality employing the officers. If police officers engage in a pattern of illegal conduct by, for example, repeatedly violating the rule of announcement, the municipality employing the officers exposes itself to civil liability for its deliberate indifference to the conduct. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388-90 & n.10 (1989). *See also City of Canton*, 489 U.S. at 396-97 (O'Connor, J., concurring in part and dissenting in part). The possibility

of the municipality being civilly liable for a pattern of illegal conduct by its officers provides strong incentive for the municipality to train the officers to comply with the rule of announcement. The possible exposure to civil liability will deter the police from routinely violating the rule of announcement.

The conduct of the officers will be subject to judicial review when the defendants challenge the legality of the no-knock entries. Even if the court ultimately concludes there was no causal relationship between the illegal governmental activity and the seizure of the evidence, the court would have reviewed the police conduct. The police conduct will also be subject to judicial review in the civil actions.

III. THIS COURT SHOULD ADOPT THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE THAT ENFORCES ART. I, § 11 OF THE WISCONSIN CONSTITUTION.

The defendant argues that this court does not have the authority to adopt a good faith exception to the exclusionary rule because the rule is a personal constitutional right rather than a judge-made rule. Brief of Defendant-Respondent at 24-28.

This court rejected the same argument in *State v. Ward*, 2000 WI 3, 231 Wis. 2d 723, ¶57, 604 N.W.2d 517, when it said that it had decided that the exclusionary rule was a judge-made rule and it refused to revisit the question.

If this court ever indicated that the Wisconsin Constitution provided for the exclusion of evidence obtained in violation of art. I, § 11, it apparently did so in reliance on a since discredited theory that the use of evidence obtained in violation of § 11 (or the Fourth Amendment) violates the § 8 (or Fifth Amendment) protection against self-incrimination. That *Hoyer v. State*,

180 Wis. 407, 415, 193 N.W. 89 (1923), relied on this theory of the convergence of the two constitutional provisions is evidenced by the court's statement that the evidence obtained in violation of § 11 was improperly received in evidence against Hoyer at his trial in violation of his rights under art. I, § 8.

The theory that the exclusionary rule is required by the conjunction of the Fourth and Fifth Amendments has not withstood critical analysis or the test of time. *See Leon*, 468 U.S. at 906, citing *Andresen v. Maryland*, 427 U.S. 463 (1976).

In *State v. Doe*, 78 Wis. 2d 161, 172-75, 254 N.W.2d 210 (1977), this court has interpreted the Wisconsin Constitution consistently with the decision in *Andresen*; and, in so doing, has also rejected the theory of the convergence of §§ 8 and 11 of art. I. This conclusion is consistent with the state's argument that the exclusionary rule enforcing art. I, § 11 is a judge-made rule, not a requirement of the Wisconsin Constitution. Because the exclusionary rule is a judge-made rule, this court has the authority to amend the rule and recognize exceptions to the rule, as the court indicated in *Conrad v. State*, 63 Wis. 2d 616, 637, 218 N.W.2d 252 (1974), when it expressed a willingness to alter the exclusionary rule but was prohibited from doing so at the time by *Mapp v. Ohio*, 367 U.S. 643 (1961). Since that time, the decision in *Leon* has provided this court the opportunity and authority to recognize an exception to the exclusionary rule.

At pages 26-27 of his brief, the defendant cites four Wisconsin Supreme Court cases to support his claim that the exclusionary rule is a personal right guaranteed by the Wisconsin Constitution. To the extent those cases indicate that the exclusionary rule is guaranteed by the Wisconsin Constitution they did so in reliance on the discredited theory of a convergence of §§ 8 and 11 of art. I. Therefore, they no longer provide a valid reason for concluding that the exclusionary rule is guaranteed by the Wisconsin Constitution to enforce art. I, sec. 11.

The defendant omitted a significant sentence when quoting from *Glodowski v. State*, 196 Wis. 265, 268, 220 N.W. 227 (1928), at page 26 of his brief. In comparing art. I, § 11 to the Fourth Amendment, the court said: "The people of this state made the same guaranty against unreasonable searches and seizures a part of their fundamental law." That sentence supports the state's contention that this court should adopt the same good faith exception to the exclusionary rule that the United States Supreme Court adopted since the two constitutions provide the same guaranty and protection.

The defendant asks this court to follow the twelve states that have rejected the good faith exception rather than the three states that have adopted it. Brief of Defendant-Respondent at 30. The defendant shortchanged the number of states that have adopted the good faith exception for the exclusionary rule that enforces their state constitutions. At least the following nine states have adopted the good faith exception: *Jackson v. State*, 722 S.W.2d 831 (Ark. 1987); *Mers v. State*, 482 N.E.2d 778 (Ind. Ct. App. 1985); *State v. Hemme*, 806 P.2d 472 (Kan. Ct. App. 1991); *Crayton v. Commonwealth*, 846 S.W.2d 684 (Ky. 1992); *State v. Ebey*, 491 So. 2d 498 (La. Ct. App. 1986); *State v. Brown*, 708 S.W.2d 140 (Mo. 1986) (en banc); *State v. Wilmoth*, 490 N.E.2d 1236 (Ohio 1986); *State v. Saiz*, 427 N.W.2d 825 (S.D. 1988); and *McCary v. Commonwealth*, 321 S.E.2d 637 (Va. 1984).

At pages 30-35 of his brief, the defendant criticizes the cost benefit analysis undertaken in *Leon*. This court, however, has already engaged in its own balancing of costs and benefits of the exclusionary rule; and this court's analysis supports the adoption of the exclusionary rule. The court indicated that the cost of losing relevant evidence was worthwhile only as long as the exclusionary rule prevented future constitutional violations. *See Conrad*, 63 Wis. 2d at 636, 638. The good faith exception is consistent with the court's analysis because the exception provides for the suppression of the evidence only when doing so deters future police misconduct.

CONCLUSION

For the reasons discussed above and in its brief-in-chief, the State of Wisconsin asks this court to conclude that the evidence seized in the execution of the search warrant was admissible into evidence, to reverse the decision of the court of appeals, and to direct that the matter be remanded to the trial court so that the case may proceed to trial.

Dated this 7th day of December, 2000.

JAMES E. DOYLE
Attorney General

Stephen W. Kleinmaier

STEPHEN W. KLEINMAIER
Assistant Attorney General
State Bar No. 1014422

Attorneys for Plaintiff-Appellant-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8908

CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font. The brief contains 3,000 words.

Stephen W Kleinmaier
STEPHEN W. KLEINMAIER

IN THE

SUPREME COURT OF WISCONSIN

* * * * *

Case Number 98-2595-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

vs.

RAYSHUN D. EASON,

Defendant-Respondent.

Review of a Decision of the Wisconsin Court of Appeals Affirming an Order of the Circuit Court of Rock County, Wisconsin, Honorable Edwin C. Dahlberg, Circuit Judge, Presiding Circuit Court Case Number 98CF1620

BRIEF OF THE WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE*

HOWARD B. EISENBERG

Wisconsin Bar Number 1014428

Post Office Box 1476
Milwaukee, Wisconsin 53201-1476

Telephone (414) 288-1768

ATTORNEY FOR AMICUS CURIAE

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RAYSHUN D. EASON,

Defendant-Respondent.

BRIEF OF THE WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE*

INTEREST OF *AMICUS*

The Wisconsin Association of Criminal Defense Lawyers (WACDL) is comprised of 250 private and public defender attorneys who provide legal representation to persons charged with criminal offenses in the state and federal courts of Wisconsin.

For the second time, WACDL submits a brief to this Court opposing the creation of a "good faith" exception to the exclusionary rule under Article I, Section 11 of the Wisconsin Constitution. In *State v. Ward*, Case No. 97-2008-CR, the

Association filed such a brief and, indeed, counsel for WACDL argued the case on behalf of one of the Defendants. In this brief, the Association reiterates its position and submits that even in light of the majority opinions in *State v. Ward*, 2000 WI 3, 231 Wis.2d 723, 604 N.W.2d 517 (2000) and *State v. Orta*, 2000 WI 4, 231 Wis.2d 782, 604 N.W.2d 543 (2000), this Court should reject the State's call to substantially undermine the State exclusionary rule by adopting a "good faith" exception.

ARGUMENT

THIS COURT SHOULD FIND THAT THERE IS NO "GOOD FAITH" EXCEPTION TO THE STATE EXCLUSIONARY RULE.

A. Even If the State Exclusionary Rule Is Considered a Judicial Remedy, it Still Is Constitutional and Should Not Be Abrogated by the Court.

In *Ward Amicus* took the position that the exclusionary rule created under Article I, Section 11 of the Wisconsin Constitution granted direct rights to Wisconsin citizens and was not merely a judicially created remedy. The majority of the Court rejected that position in *Ward*, ¶57-58, and decided not to "revisit" the decision in *State v. Tompkins*, 144 Wis.2d 116, 423 N.W.2d 823 (1988). Amicus regrets the Court's decision, particularly in light

of the authority that was not cited in *Tompkins* which demonstrates that the exclusionary rule is, indeed, a direct grant of rights to individuals. *In accord*: *State v. Orta*, ¶¶7-15, 231 Wis.2d at 786-791, 604 N.W.2d at 545-547 (Prosser, J., *concurring*). Nevertheless, for the purpose of this brief, we assume that the 1923 decision of *Hoyer v. State*, 180 Wis.2d 407, 193 N.W.2d 89 (1923) created a judicial remedy for a constitutional violation and did not construe the Wisconsin Constitution as creating a right to have illegally obtained evidence excluded.

But the fact that the exclusionary rule is a judicial remedy does not mean that the Court may simply abolish or substantially change the remedy. A judicially created remedy can be constitutional in nature if its primary purpose was to assure that the enumerated constitutional right was safeguarded and protected. The Supreme Court's recent decision in *Dickerson v. United States*, 530 U.S. 428, 120 S.Ct. 2326 (2000) demonstrates this point. In *Dickerson* the Supreme Court was called upon to determine whether Congress could pass a statute, 18 U.S.C. §3501, which essentially overruled *Miranda v. Arizona*, 384 U.S. 436 (1966) and did away with the familiar warnings that must be

given before a suspect is subjected to custodial interrogation. To the surprise of some, the Supreme Court held that the *Miranda* decision was constitutional and that section 3501 of title 18 was unconstitutional. This, notwithstanding the fact that the Court had repeatedly referred to *Miranda* as being a prophylactic rule created by the Court. Speaking for the seven member majority, Chief Justice Rehnquist noted that *Miranda* was intended to assure that suspects' rights to due process of law and the privilege against self-incrimination were protected. The Chief Justice noted that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture." 120 S.Ct. at 2336. The Court concluded by saying that the "*Miranda* warnings" themselves are not constitutional, but if the decision was to be superceded by statute, Congress would have to come up with something that protected the suspect to the same extent as the *Miranda* decision, and section 3501 did not do that. 120 S.Ct. at 2335.

No criminal procedure decision of the Supreme Court in the last fifty years has been more controversial than *Miranda,* and none more revolutionary. *Miranda* created out of whole cloth a procedure that existed nowhere in the United States before 1966,

and the decision has been relentlessly attacked for 35 years. And yet, the Supreme Court still found that the decision was constitutional and not merely remedial.

If that can be said of the *Miranda* rights, it surely must be said of the exclusionary rule in Wisconsin which has been in existence for half of the period since Statehood. Few rights are more embedded in our jurisprudence in Wisconsin than the exclusionary rule. And this Court has so held. Just a few years after the *Hoyer* decision, this Court said: "Until the people shall see fit to change this constitutional mandate, each department of government must give full force and effect to this command of the people, even though it may seem at times to render more difficult the apprehension and punishment of those who violate the laws of the state. The preservation of the rights guaranteed by the Constitution is of greater moment than the detection of any crime or the punishment of any single offender." *Glodowski v. State*, 196 Wis. 265, 220 N.W. 227, 229 (1928).

This Court has expressly said that it lacks the power to modify the exclusionary rule because it is constitutional in nature. "[I]f the time has come when convictions are more important than the preservation of the guarantees of secs. 8 and

11, art. I of the state constitution...these sections should be amended by popular vote as the constitution prescribes, and *not by a relaxation of rules by new judicial interpretation.*" *State v. Kroening,* 274 Wis. 266, 275-276, 79 N.W.2d 810, 816 (1956) (emphasis added).

Thus saying that *Hoyer* created a "judicial remedy" is not the end of the story. Designation of the "exclusionary rule" as a "remedy"--and not a "right"--does not mean this Court can willy-nilly change the rule. The rule was created to protect the constitutional rights of Wisconsin citizens at a time the federal Fourth Amendment did not extend to state action. Now after *Mapp v. Ohio*, 367 U.S. 643 (1961), the Fourth Amendment applies to the state through the Fourteenth Amendment, but it is a watered down right burdened with the "good faith" exception adopted in *United States v. Leon*, 468 U.S. 897 (1984). That is clearly not the remedy this Court adopted in 1923, nor is it the remedy this Court has applied in the intervening 77 years. Just as the Court in *Dickerson* recognized that to adopt the Government's position would require the explicit overruling of *Miranda* (120 S.Ct. at 2336), so here adoption of the "good faith" exception to the state exclusionary rule would require that the

Court explicitly overrule *Hoyer* and its many progeny. There is simply no basis for such an extreme step.

The exclusionary rule is constitutional, and there must be a constitutional basis to abrogate the rule. Absent such a showing, the prosecution's argument here must be rejected.

B. *The Fact That the U.S. Supreme Court Has Adopted a Good Faith Exception to the Fourth Amendment Exclusionary Rule Is Not a Basis for this Court to Adopt Such a Rule Under State Law. The State Must Prove a Need for Such a Change in the Law.*

The Supreme Court of the United States is not the repository for all judicial wisdom in the United States. Sometimes the Court has made poor decisions, *e.g. Dred Scott v. Sandford*, 60 U.S. 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896). Other times the Court has concluded that its original decisions were ill advised and has overruled those decisions. *E.g. Batson v. Kentucky*, 476 U.S. 79 (1986), *overruling Swain v. Alabama*, 380 U.S. 202 (1965). There was even a time when this Court refused to acknowledge the supremacy of the U.S. Supreme Court on matters of federal law. *See, Ableman v. Booth*, 11 Wis. 517 (1859). *See generally*, Beitzinger, "Federal Law Enforcement and the Booth Cases," 41 *Marq. L. Rev.* 7, 25 (1957).

Other than when required by the Supremacy Clause, this Court is not obligated to follow a decision of the U.S. Supreme Court. Of course, this Court should view such decisions as persuasive, just as it would the decisions from other state appellate courts and the federal courts of appeal. But ultimately, this Court, not the federal courts, is the arbiter of the meaning of the Wisconsin Constitution. *See, American Federation of Labor v. Watson*, 327 U.S. 582, 596 (1946). "[A] State is free as a matter of its own law to impose greater restrictions on police activity than those [the United States Supreme] Court holds to be necessary upon federal constitutional standards." *Oregon v. Hass*, 420 U.S. 714, 719 (1975). The Wisconsin Constitution may afford greater protection than the United States Constitution, *State v. Hansford*, 219 Wis.2d 226, 242, 580 N.W.2d 171, 178 (1998).

The law of this State can not be controlled by the whims of the U.S. Supreme Court. Even assuming that in 1923 this Court was merely adopting the rationale of the federal exclusionary rule in *Weeks v. United States*, 232 U.S. 383 (1914), that does not mean that forever more this Court is bound to construe the State Constitution the same way the federal Supreme Court has interpreted the U.S. Constitution, no matter how ill conceived the

reasoning of the majority of that Court might be.

The burden must fall squarely on the shoulders of the Wisconsin Attorney General to prove to this Court that the Wisconsin Exclusionary Rule must be changed.[1] And the State has fallen far short of sustaining its burden. The best the State can come up with is that Wisconsin should have the same rule as that adopted by the United States Supreme Court. Such an argument stands comity and federalism on its head–and on its ear. There is nothing magic–or even presumptively correct–about policy decisions of the U.S. Supreme Court. This Court must respect and consider the decisions of other courts, including the U.S. Supreme Court, but when construing the Wisconsin Constitution this Court must decide what is the best law in this State.

There are a number of situations in which this Court has acknowledged greater rights under the State Constitution than that afforded under the United States Constitution. Most recently

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[1] The party seeking to change the present state of the law has the burden of proving the need for such change and therefore bears the risk of failure of persuasion. *Compare*, *State v. McFarren*, 62 Wis.2d 492, 499, 215 N.W.2d 459, 463 (1974). The party seeking to change the status quo bears the burden of persuasion. *See* Edward W. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 Stan. L. Rev. 5, 7 (1959)

in *State v. Hansford*, 219 Wis.2d at 242, 580 N.W.2d at 178, this Court unanimously struck down a statute which purported to limit misdemeanor juries to six persons. The Court found that the Wisconsin Constitution guaranteed a 12 person jury in such cases, even though the U.S. Constitution had been read to require only six jurors, *Williams v. Florida*, 399 U.S. 78 (1970).

Moreover, the Wisconsin Constitution guarantees a jury trial in all criminal cases, *Hansford*, 219 Wis.2d at 241, 580 N.W.2d at 177, while the United States Constitution does not guarantee a jury trial to "petty" offenders, *Duncan v. Louisiana*, 391 U.S. 145, 161 (1968); *Baldwin v. New York*, 399 U.S. 66 (1970). Similarly, the Wisconsin Constitution requires a unanimous jury verdict, *Manson v. State,* 101 Wis.2d 413, 417, 304 N.W.2d 729, 731 n. 1 (1981), while the Sixth Amendment does not, *Apodaca v. Oregon*, 406 U.S. 404 (1972).

This Court has reached these decisions even though there was virtually no debate about the guarantee of the right to a jury trial when the Wisconsin Constitution was adopted, *Hansford*, 219 Wis.2d at 235, 580 N.W.2d at 175.

In the area of right to counsel, this Court has granted more rights under the State Constitution than is required under federal

law. In Wisconsin, all persons charged with a misdemeanor are entitled to publicly provided counsel, *State ex rel. Winnie v. Harris*, 75 Wis.2d 547, 249 N.W.2d 791 (1977), while the U.S. Constitution does not grant all misdemeanants such a right, *Argersinger v. Hamlin*, 407 U.S. 25 (1972).[2]

Criminal defense attorneys do not favor crime, violence, or the illegal use of controlled substances. But *Amicus* knows that frequently the rights of "innocent" citizens are determined by, and protected by, the decisions made in cases of persons suspected of, or charged with, crimes. It is simplistic to think that gutting the exclusionary rule will reduce crime any more than the illegal seizures of bootleg liquor in the 1920's, which led to the original exclusionary rules, stopped the production of intoxicating liquor during Prohibition. Indeed, the number of convictions that

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[2] *Winnie v. Harris*, extending the right to counsel to all misdemeanants as a matter of state constitutional law, is particularly significant because, before *Argersinger*, this Court did not believe that counsel was required by the U.S. Constitution for any person charged with a crime punishable by six months or less in jail, *State ex rel. Plutshack vs. State Dept. of Health and Social Services*, 37 Wis.2d 713, 155 N.W.2d 549 (1968), although Chief Justice Hallows and Justice Wilkie would have required counsel for all misdemeanants under the Wisconsin Constitution, 37 Wis.2d at 727-728, 155 N.W.2d at 556 (Hallows, C.J., *dissenting*). Justice Day's opinion in *Winnie* is clearly a decision by this Court to adopt a "better" rule of law under the State Constitution, than was applied under the U.S. Constitution in *Argersinger*.

are lost due to the application of the exclusionary rule is minuscule in part because law enforcement agencies have been trained to follow the constitutional requirements first announced in the 1920's.

The *dicta* in *Conrad v. State*, 63, Wis.2d 616, 634-641, 218 N.W.2d 252, 261-264 (1974), criticizing the exclusionary rule, missed one of the primary benefits of the exclusionary rule which is obvious to members of WACDL who are involved in defending criminal defendants every day in courts around Wisconsin. The knowledge that illegally seized evidence will be excluded from evidence has resulted in dramatically improved training for police and judicial officers, improved procedures, and more scrupulous concern about the rights of all the citizens of this State. One can not measure the value of the exclusionary rule merely by looking at the cases that wind up in court, much less those cases that result in published appellate court decisions. Indeed, one can not determine the value of the rule even by looking at the searches and seizures that actually occur.

The true importance of the exclusionary rule is that it has required police to protect the rights of *all* citizens by not engaging in conduct that will violate the Fourth Amendment or

Article I, Section 11 of the Wisconsin Constitution in the first place. The exclusionary rules require judicial officers to give close scrutiny to requests for search and arrest warrants before issuing such process. If a judge issues a warrant that is later found to have been issued without probable cause, the search and seizure are invalid, and the evidence suppressed. A "good faith" exception to the exclusionary rule means that if a judicial officer issues a warrant without probable cause and that warrant is executed and evidence of crime is found, the criminal defendant has no remedy. There is no reason for the judicial officer to carefully scrutinize the warrant request because the judge knows that once that warrant is issued, the decision to issue the warrant will never be reviewed except in the exceedingly unlikely event that some kind of civil rights action is brought, and even then the judge is immune from damages. *See*, *Abdella v. Catlin*, 79 Wis.2d 270, 277-279, 255 N.W.2d 516, 520-521 (1977). Judges are subject to the pressure of a law enforcement agency or prosecutor that is eager to pursue a suspect or a crime, even if there is less than probable cause to justify police intrusion into the property of the person under suspicion. The exclusionary rule--without a "good faith" exception--means that the decision

to issue a warrant will always be subject to review by a circuit judge or appellate court that is removed from the immediate pressure of the county courthouse or police headquarters. A "good faith" exception removes the probable cause decision from further judicial review in the large majority of cases and thus denies an entire level of constitutional protection to every citizen of Wisconsin. This is not an acceptable result.

There are powerful reasons to maintain the protection of the exclusionary rule that has stood this State well for almost 80 years. The State must do more than wave the flag of "law and order" to justify such a substantial change in the law of this State. Because the state has failed to show such a reason, the request should be rejected.

CONCLUSION

The Wisconsin Association of Criminal Defense Lawyers urges this Court to specifically rule that there is no "good faith" exception to the Wisconsin exclusionary rule.

Respectfully submitted,

HOWARD B. EISENBERG

Wisconsin Bar Number 1014428

Post Office Box 1476
Milwaukee, Wisconsin 53201-1476

Telephone (414) 288-1768
FAX (414) 288-6403
E-MAIL: Howard-Eisenberg@excite.com

ATTORNEY FOR AMICUS CURIAE

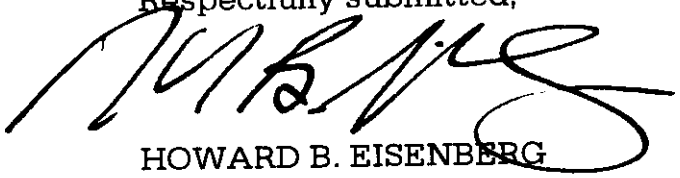
HBE
January 9, 2001

CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief and appendix produced by a proportional serif font. The length of this Brief is 2,899 words.

Dated: 1/10/01

Respectfully submitted,



HOWARD B. EISENBERG

Wisconsin Bar Number 1014428

Post Office Box 1476
Milwaukee, Wisconsin 53201-1746

Telephone (414) 288-1768
FAX (414) 288-6403
Howard-Eisenberg@excite.com

ATTORNEY FOR AMICUS CURIAE

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 98-2595-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

RAYSHUN D. EASON,

Defendant-Respondent.

REVIEW OF DECISION OF DISTRICT IV OF COURT OF APPEALS THAT AFFIRMED THE TRIAL COURT'S ORDER SUPPRESSING EVIDENCE THAT WAS ENTERED IN CIRCUIT COURT FOR ROCK COUNTY, THE HONORABLE EDWIN C. DAHLBERG, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT-PETITIONER IN RESPONSE TO BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE*

JAMES E. DOYLE
Attorney General

STEPHEN W. KLEINMAIER
Assistant Attorney General
State Bar No. 1014422

Attorneys for Plaintiff-Appellant-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8908

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BRIEF OF PLAINTIFF-APPELLANT-PETITIONER IN RESPONSE TO BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE*

ARGUMENT

I. THIS COURT HAS THE AUTHORITY TO MODIFY THE EXCLUSIONARY RULE BY ADOPTING THE GOOD FAITH EXCEPTION.

In *State v. Ward*, 2000 WI 3, 231 Wis. 2d 723, ¶57, 604 N.W.2d 517, this court reaffirmed that the

exclusionary rule adopted in *Hoyer v. State*, 180 Wis. 407, 193 N.W. 89 (1923), is a judge-made rule rather than a personal right under the Wisconsin Constitution.

In its *amicus curiae* brief at page 3, the Wisconsin Association of Criminal Defense Lawyers (WACDL) assumes that the exclusionary rule is a judicial remedy and not a right created by the Wisconsin Constitution. Nevertheless, WACDL argues that the judicially-created exclusionary rule is constitutional in nature; and, therefore, there must be a constitutional basis to abrogate the rule. Brief of WACDL at 3-7.

To support its claim that the Wisconsin exclusionary rule is constitutional in nature, WACDL cites *Dickerson v. United States*, 120 S. Ct. 2326, 2329, 2336 (2000), in which the Court held that its decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), announced a constitutional rule that Congress, therefore, could not supercede legislatively.

Labeling the judicially-created Wisconsin exclusionary rule "constitutional in nature" does not add anything to the debate over a good faith exception to the exclusionary rule. Whether the exclusionary rule is "constitutional in nature" is irrelevant to this court's authority to modify the rule by adopting a good faith exception.

In *Dickerson*, the Court acknowledged that it had created exceptions to the *Miranda* decision even though it was constitutionally based. *See Dickerson*, 120 S. Ct. at 2335. The Court explained in *Dickerson*, 120 S. Ct. at 2335:

> These decisions [that created exceptions to *Miranda* and broadened it] illustrate the principle--not that *Miranda* is not a constitutional rule--but that *no constitutional rule is immutable*. No court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it, and the sort of

> modifications represented by these cases are as much a normal part of constitutional law as the original decision.

(Emphasis added.) The Supreme Court later noted that, if anything, cases subsequent to *Miranda* reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling. *See Dickerson*, 120 S. Ct. at 2336.

The Court's comments recognize that even judicially-created rules that are constitutional in nature can be modified by later decisions to reduce their impact on law enforcement.

The good faith exception adopted by the Supreme Court in *United States v. Leon*, 468 U.S. 897, 905 (1984), is an example of a modification of the exclusionary rule without jeopardizing the rule's ability to perform its intended functions.

Dickerson and *Leon* establish that, even if the judicially-created Wisconsin exclusionary rule is constitutional in nature, this court has the authority to modify the rule by adopting the good faith exception.

In arguing that the exclusionary rule is constitutional in nature, WACDL states that "[f]ew rights are more embedded in our jurisprudence in Wisconsin than the exclusionary rule." Brief of *Amicus Curiae* at 5.

The exclusionary rule has been employed in Wisconsin only since 1923; and it was not well established in American law before that date. By the time the United States Supreme Court held in 1949 that the Fourth Amendment was enforceable against the states, thirty states had rejected the exclusionary rule in *Weeks v. United States*, 232 U.S. 383 (1914), and only seventeen states were in agreement with it. *See Wolf v. Colorado*, 338 U.S. 25, 29, 38 (1949). As explained in Akhil Reed Amar, *Against Exclusion (Except to Protect Truth or Prevent Privacy Violations)*, 20 Harv. J.L. & Pub. Pol'y

457, 459-60 (1997), the exclusionary rule was developed late in legal history:

> What about history? The history emphatically rejects any idea of exclusion. The English common law cases underlying the Fourth Amendment never recognized exclusion. England still does not recognize exclusion. Canada, until the 1980s, resisted the temptation. None of the Founders ever linked the Fourth Amendment to exclusion. In the first century after Independence, no federal court ever recognized exclusion. No state court--and remember, virtually every State's constitution had a counterpart to the Fourth Amendment--ever excluded evidence in this first century.
>
> When the most thoughtful judges of the era were presented with the case for exclusion--and it came up rarely, because it was so outlandish--they dismissed it out of hand. Joseph Story, who was no slouch as a scholar, confronted the argument for exclusion, and said that he had never heard of a case in the Anglo-American world excluding evidence on the ground that it was illegally obtained. The Massachusetts Supreme Judicial Court reached the same conclusion a generation later, in a case presided over by its great Chief Justice Lemuel Shaw.

(Footnotes omitted.)

The relatively short history of the exclusionary rule demonstrates that it has not developed the kind of legal tradition that merits unrelenting resistance to modification.

WACDL at pages 5-6 of its brief claims that a quote from *State v. Kroening*, 274 Wis. 266, 275-76, 79 N.W.2d 810 (1956), stands for the proposition that this court cannot modify the exclusionary rule by judicial interpretation.

In *Kroening*, 274 Wis. at 275-76, the court said that the guaranties of art. I, §§ 8 and 11 of the Wisconsin Constitution cannot be amended by a relaxation of rules by new judicial interpretation. As reaffirmed in *Ward*, 231 Wis. 2d 723, ¶57, the exclusionary rule is a judge-

made rule and it is not a guaranty of art. I, § 11. Because the rule is not guaranteed by art. I, § 11, this court has the authority to modify its judicially-created rule.

The rights that are guaranteed by art. I, § 11 were addressed in *Glodowski v. State*, 196 Wis. 265, 268, 220 N.W. 227 (1928), which is another case quoted in WACDL's brief at page 5. WACDL quotes all but one sentence from a paragraph in *Glodowski*, 196 Wis. at 268. The sentence omitted by WACDL is very significant. Prior to the paragraph, the court traced the history of the Fourth Amendment and pointed out that it was adopted to prevent abuses in connection with searches and seizures. *See Glodowski*, 196 Wis. at 267-68. Then, in the next sentence, which was omitted from WACDL's quote, this court said: "The people of this state made *the same guaranty* against unreasonable searches and seizures a part of their fundamental law." *Glodowski*, 196 Wis. at 268 (emphasis added). In that sentence, this court acknowledged that art. I, § 11 was meant to provide the same guaranties and protections as the Fourth Amendment. Since art. I, § 11 was adopted to provide the same guaranty as the Fourth Amendment, it should not be interpreted or applied to provide greater guaranties.

The *Kroening* decision also indicated that the Wisconsin exclusionary rule should be interpreted and applied the same as the federal rule when the court said: "*Wisconsin subscribes to the federal rule* that evidence obtained by illegal search and seizure is inadmissible upon the trial." *Kroening*, 196 Wis. at 272 (emphasis added).

Therefore, *Glodowski* and *Kroening* support the modification of the Wisconsin exclusionary rule to be consistent with the federal exclusionary rule to which Wisconsin subscribes. *Glodowski* and *Kroening* also demonstrate that art. I, § 11 and the Wisconsin exclusionary rule were not developed independent from the Fourth Amendment and the federal exclusionary rule. Instead, art. I, § 11 was intended to provide the same

guaranty as the Fourth Amendment; and to enforce § 11, Wisconsin subscribed to the federal exclusionary rule.

Wisconsin should continue its tradition of subscribing to the federal exclusionary rule and this court should adopt the good faith exception to the rule just as the United States Supreme Court did in *United States v. Leon*, 468 U.S. 897 (1984).

II. WISCONSIN SHOULD ADOPT THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE.

In criticizing the state's request that this court adopt the good faith exception to the exclusionary rule, WACDL claims that the best reason the state can come up with for adopting the exception is that Wisconsin should have the same rule as that adopted by the United States Supreme Court. WACDL states that such an argument "stands comity and federalism on its head--and on its ear." Brief of *Amicus Curiae* at 9.

In the context of search and seizure law, aligning the state rule with the federal does not stand comity and federalism on its head. Applying the Wisconsin exclusionary rule consistently with the federal rule is consistent with Wisconsin's subscription to the federal rule, *Kroening*, 274 Wis. at 272, consistent with Wisconsin's adoption of the same guaranty against unreasonable search and seizures that the Fourth Amendment provides, *Glodowski*, 196 Wis. at 268, and consistent with this court's practice of conforming the law of search and seizure under the Wisconsin Constitution to that developed by the United States Supreme Court under the Fourth Amendment. *State v. O'Brien*, 223 Wis. 2d 303, 316-17, 588 N.W.2d 8 (1999); *State v. Phillips*, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998); *State v. Tompkins*, 144 Wis. 2d 116, 131, 423 N.W.2d 823 (1988); *State v. Fry*, 131 Wis. 2d 153, 172, 388 N.W.2d 565 (1986); *Browne v. State*, 24 Wis. 2d 491, 503, 129 N.W.2d

175 (1964). In other words, in the context of search and seizure law, aligning the Wisconsin exclusionary rule with the federal rule is a good reason for adopting the good faith exception.

WACDL cited other constitutional provisions where the Wisconsin Constitution is interpreted to provide more rights to the individual than the United States Constitution provides. Brief of *Amicus Curiae* at 9-11.

WACDL cited *State v. Hansford*, 219 Wis. 2d 226, 580 N.W.2d 171 (1998), for requiring twelve-person juries under the Wisconsin Constitution when the federal constitution would only require six jurors. Brief of *Amicus Curiae* at 10. In *Hansford*, 219 Wis. 2d at 234-41, the court relied on the common law and Wisconsin Supreme Court decisions dating back to 1853 to conclude that the Wisconsin Constitution requires a twelve-person jury. Unlike *Hoyer*, the court in *Hansford* relied on no federal cases to interpret the Wisconsin Constitution.

WACDL notes that the Wisconsin Constitution has been interpreted to guarantee the right to a jury trial in all criminal cases, whereas under the federal constitution there is no right to a jury trial for petty offenses. Brief of *Amicus Curiae* at 10. Again, however, unlike *Hoyer*, the Wisconsin Supreme Court in *Hansford*, 219 Wis. 2d at 240, and *State v. Lockwood*, 43 Wis. 403, 405 (1877), relied on no federal precedent in interpreting the Wisconsin Constitution.

Citing *Manson v. State*, 101 Wis. 2d 413, 417 n.1, 304 N.W.2d 729 (1981), WACDL argues that the Wisconsin Constitution requires a unanimous verdict, while the Sixth Amendment does not, citing *Apodaca v. Oregon*, 406 U.S. 404 (1972). Brief of *Amicus Curiae* at 10. In this example, WACDL simply misstates *Apodaca*, a case in which five Supreme Court justices concluded

that the Sixth Amendment does require a unanimous verdict in federal criminal trials.[1]

Finally, WACDL cites *State ex rel. Winnie v. Harris*, 75 Wis. 2d 547, 249 N.W.2d 791 (1977), for the proposition that the Wisconsin Constitution provides that all persons charged with a misdemeanor are entitled to publicly provided counsel. Brief of *Amicus Curiae* at 11. It is assumed that WACDL means indigent persons, and not literally all persons, are entitled to publicly provided counsel. In any event, the court in *Winnie* invoked its administrative authority and not the Wisconsin Constitution in providing for counsel in all misdemeanor cases. The Wisconsin Constitution is not mentioned in the opinion in regard to the right to counsel. The court required that in all misdemeanor cases defendants be informed of the right to counsel and be informed that counsel will be provided for indigent defendants "[t]o insure the fair administration of justice." *Winnie*, 75 Wis. 2d at 556.

The review of the cases shows that where this court interpreted the Wisconsin Constitution to provide greater protections than the federal constitution provides, this

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[1] *Apodaca*, 406 U.S. at 414 (Stewart, J., dissenting, joined by Justices Brennan and Marshall); concurring and dissenting opinions *sub nom Johnson v. Louisiana*, 406 U.S. 356 (1972); 406 U.S. at 369-71 (Powell, J., concurring); 406 U.S. at 382-83 (Douglas, J., dissenting); and 406 U.S. at 395 (Brennan, J., dissenting). *See also Wray v. State*, 87 Wis. 2d 367, 275 N.W.2d 731 (Ct. App. 1978) (citing *Apodaca* for the proposition that the Sixth Amendment requires a unanimous verdict in a federal criminal trial). In *Apodaca*, 406 U.S. at 405-15, four justices concluded that the Sixth Amendment did not require a unanimous jury. The Court held that the state defendant was denied relief when Justice Powell, who believed that the Sixth Amendment required unanimous verdicts in federal cases, concluded that the Sixth Amendment was not applicable to the states through the Fourteenth Amendment. *Johnson*, 406 U.S. at 365-80 (Powell, J., concurring). Therefore, it is accurate to say that the United States Constitution does not command the states to require a unanimous jury verdict in criminal cases; but it is inaccurate to say the Sixth Amendment does not require a unanimous verdict.

court cited no federal precedent in interpreting the Wisconsin Constitution. In adopting the art. I, § 11 exclusionary rule, however, this court relied exclusively upon federal cases and other state court decisions that, in turn, relied on the federal cases. *Hoyer*, 180 Wis. at 415. Therefore, the fact that this court interpreted the other constitutional provisions differently from the federal constitution provides no reason for interpreting the Wisconsin exclusionary rule different from the federal rule. Instead, the history of the Wisconsin exclusionary rule demonstrates that it should be interpreted and applied consistently with the federal rule and that the good faith exception should be adopted for the Wisconsin rule.

WACDL states that "[t]he true importance of the exclusionary rule is that it has required police to protect the rights of *all* citizens by not engaging in conduct that will violate the Fourth Amendment or Article I, Section 11 of the Wisconsin Constitution in the first place." Brief of *Amicus Curiae* at 12-13.

The state agrees that the purpose of the exclusionary rule is to deter police from violating the constitutional rights of the citizens. This also means that the rule does not protect the rights of all citizens when it fails to deter illegal police conduct. If the police make an illegal search of the home of an innocent person, the exclusionary rule does not help that person since there is no evidence to suppress. The exclusionary rule helps that innocent citizen *only* to the extent it deters the police from illegal conduct. When the police seek a warrant to search that home, the exclusionary rule has served its purpose because it has encouraged the police to get the warrant and deterred them from the illegal warrantless search.

WACDL complains that the good faith exception may leave the criminal defendant with no remedy. Brief of *Amicus Curiae* at 13.

If the defendant has no remedy, he is in the same position as the innocent person. Without the good faith

exception, however, the balance that supports the exclusionary rule is absent. As explained in *Conrad v. State*, 63 Wis. 2d 616, 636, 218 N.W.2d 252 (1974), the integrity of the court is compromised when it is required to suppress evidence without the clear assurance that the exclusionary rule is serving its purpose of deterring future transgressions. The good faith exception applies in those circumstances where the exclusionary rule would not deter future illegal police conduct. Therefore, the trial court should not be required to suppress relevant evidence where the purpose of the exclusionary rule is not served.

WACDL also seems to argue that trial court judges will not responsibly perform their duty when issuing search warrants if a good faith exception is adopted. Brief of *Amicus Curiae* at 13.

WACDL provides no basis for its cynical prediction of the performance of the trial judges. There is no basis for concluding that trial judges will not conscientiously perform their duties in issuing search warrants even if the exclusionary rule does not apply to an erroneous issuance of a warrant. WACDL also provides no basis to support its insinuation that trial judges submit to improper pressure from police and prosecutors to issue warrants.

WACDL claims that a good faith exception removes the probable cause decision from appellate review in the large majority of cases. Brief of *Amicus Curiae* at 14.

Again, WACDL provides no basis for its sweeping statement. Even in cases where appellate courts apply the good faith exception, the courts should first address the probable cause issue to determine whether the search or seizure was illegal. Appellate courts should address the probable cause issue to educate the trial courts and the police for future searches and warrants. The more the law of probable cause is developed by appellate courts the less the reasonably objective police officer can rely on invalid warrants; and, if the reasonably objective officer could not

rely on the warrant, the good faith exception would not apply.

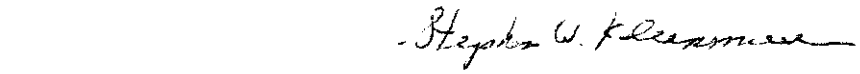
The good faith exception would serve good public policy by assisting the exclusionary rule in fulfilling the purpose of deterring police misconduct and not suppressing evidence when the purpose is not served, by providing additional incentive for police to obtain warrants, by providing judges additional incentive to carefully review the applications for search warrants and by applying the Wisconsin and federal constitutions uniformly. *See State v. Fry*, 131 Wis. 2d 153, 175-76, 388 N.W.2d 565 (1986) (conforming Wisconsin's search and seizure law to the federal law is in accord with sound public policy).

CONCLUSION

For the reasons cited in this brief and the other briefs submitted by the State of Wisconsin, the state requests this court to adopt a good faith exception to the exclusionary rule if the court reaches that issue in this case.

Dated this 22nd day of January, 2001.

JAMES E. DOYLE
Attorney General



STEPHEN W. KLEINMAIER
Assistant Attorney General
State Bar No. 1014422

Attorneys for Plaintiff-Appellant-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8908

CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font. The brief contains 2,989 words.

Stephen W. Kleinmaier

STEPHEN W. KLEINMAIER